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ONTARIO LABOUR RELATIONS BOARD REPORTS

January/February 1998



Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Bimonthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1998] OLRB REP. JANUARY/FEBRUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

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UNIVISION MARKETING GROUP INC., CLAC; RE KRISTA BEURLING, KEITH BIRD, BRAD DIENO, KAREN HALL, LORI HALL, DAVID HOOKER, ELIZABETH MCLEAN, BLAINE SCOTT AND CAROLYN STEINGARD.....

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First Contract Arbitration - Construction Industry - Board earlier directing that first collective agreement be settled by arbitration and parties requesting that Board arbitrate agreement - Parties resolving all issues except wages in second year of collective agreement - Union proposing 2% increase in second year and employer proposing no increase - Board reviewing relevant comparative collective agreements and finding union's proposal "not unreasonable" - Board awarding 2% increase effective January 1, 1998

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ONTARIO HYDRO, G.T. SURDYKOWSKI, OLRB, IBEW, LOCAL 1788, IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO, IBEW, LOCAL 105, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353, THE IBEW CONSTRUCTION COUNCIL OF ONTARIO, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1687, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE PWU, CUPE, LOCAL 1000.....

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Judicial Review - Discharge - Duty of Fair Representation - Reconsideration - Unfair Labour Practice - Applicant alleging that union's decision not to refer discharge grievance to arbitration arbitrary and unlawful - Board satisfied that union did everything reasonable in the circumstances and that its actions not arbitrary - Complaint dismissed - Reconsideration application dismissed - Application for judicial review dismissed by Divisional Court PATEL, CHAMPUBEN; RE OLRB, AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, LOCAL 551, C.L.C., AFL-CIO AND LEVI-STRAUSS & CO (CANADA) INC.	138
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UNIVISION MARKETING GROUP INC., CLAC; RE KRISTA BEURLING, KEITH BIRD, BRAD DIENO, KAREN HALL, LORI HALL, DAVID HOOKER, ELIZABETH MCLEAN, BLAINE SCOTT AND CAROLYN STEINGARD.....

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ONTARIO HYDRO, G.T. SURDYKOWSKI, OLRB, IBEW, LOCAL 1788, IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO, IBEW, LOCAL 105, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353, THE IBEW CONSTRUCTION COUNCIL OF ONTARIO, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1687, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE PWU, CUPE, LOCAL 1000..... 136

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TORONTO BOARD OF EDUCATION (PLANT OPERATIONS); RE SELWYN PIETERS; RE CUPE, LOCAL 134 AND THE AFRICAN CANADIAN LEGAL CLINIC 104

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HONEYWELL LIMITED/HONEYWELL LTEE.; RE STEVEN KARIKAS; RE NATIONAL, AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA, LOCAL 80.....

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CARLETON UNIVERSITY; RE CUPE AND ITS LOCAL 2424.....

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Remedies - Lock-Out - Ontario Hydro assigning several hundred employees to remain at home on full pay and benefits - PWU alleging that circumstances amounting to untimely and therefore unlawful lock-out within meaning of the Act - In absence of economic detriment and where matter more appropriately dealt with through grievance arbitration process, Board finding it inappropriate to grant relief, even if lock-out committed - Board declining to determine whether economic sanction or detriment is necessary part of objective component of lock-out, or whether Ontario Hydro's conduct was motivated by a "view" to induce a bargaining concession

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Sale of a Business - Bargaining Rights - Construction Industry - Collective Agreement - Related Employer - Board dismissing related employer and successor rights applications on ground that collective agreement relied on by union applies only in United States and creates no bargaining rights in Ontario

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NATIVE CHILD AND FAMILY SERVICES OF TORONTO; RE CUPE, AND ITS LOCAL 3875.....

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Trade Union - Certification - Construction Industry - Judicial Review - Reconsideration - Power Workers' Union (PWU) seeking to displace International Brotherhood of Electrical Workers (IBEW) in several bargaining units - Board concluding that PWU not a construction "trade union" within meaning of section 126 of the Act and therefore not entitled to bring its certification applications - Applications for certification and request for reconsideration dismissed - PWU's application for judicial review dismissed by Divisional Court

ONTARIO HYDRO, G.T. SURDYKOWSKI, OLRB, IBEW, LOCAL 1788, IBEW ELECTRICAL POWER SYSTEMS CONSTRUCTION COUNCIL OF ONTARIO, IBEW, LOCAL 105, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 353, THE IBEW CONSTRUCTION COUNCIL OF ONTARIO, THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1687, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION AND ELECTRICAL CONTRACTORS ASSOCIATION OF ONTARIO; RE PWU, CUPE, LOCAL 1000.....

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Unfair Labour Practice - Abandonment - Bargaining Rights - Change in Working Conditions - Discharge - Discharge for Union Activity - Duty to Bargain in Good Faith - Duty of Fair Representation - First Contract Arbitration - Practice and Procedure - Settlement - Group of employees filing unfair labour practice complaint alleging that employer had violated statutory freeze, breached the duty to bargain in good faith and had otherwise violated the Act by terminating certain employees for exercising rights under the Act - Employees also filing complaint alleging that their union had breached its duty to bargain in good faith and its duty of fair representation in how it responded (or failed to respond) to the employer's unfair labour practices and in how it communicated (or failed to communicate) with employees during its period of representation and in abandoning its bargaining rights - Board dismissing complaint alleging unfair labour practices that preceded union's certification for delay - Board finding that employees without standing to allege breach of statutory freeze or breach of duty to bargain in good faith - Board declining to inquire into certain matters previously settled - Board declining to dismiss certain discharge allegations for delay - Board, however, satisfied that applicants pleading prima facie case with respect to allegations of lack of vigilance and settling unfair labour practice complaint without consultation with affected employees and with respect to failure to take action when requested with respect to certain discharge and discipline of employees and with respect to wage proposal made to employer without consulting bargaining team and with respect to abandonment of bargaining unit - Board finding that union's failure

to make application for first contract direction not amounting to prima facie breach of section 74 of the Act

UNIVISION MARKETING GROUP INC., CLAC; RE KRISTA BEURLING, KEITH BIRD, BRAD DIENO, KAREN HALL, LORI HALL, DAVID HOOKER, ELIZABETH MCLEAN, BLAINE SCOTT AND CAROLYN STEINGARD.....

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Unfair Labour Practice - Discharge - Duty of Fair Representation - Judicial Review - Applicant alleging violation of duty of fair representation through union's handling of his discharge grievance at settlement stage and at arbitration, as well as union's subsequent failure to apply for judicial review of arbitrator's award - Complaint dismissed - Application for judicial review dismissed by Divisional Court

NOVIC, MIKE; RE METROPOLITAN TORONTO CIVIC EMPLOYEES' UNION LOCAL 43, MUNICIPALITY OF METROPOLITAN TORONTO AND THE ONTARIO LABOUR RELATIONS BOARD

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Unfair Labour Practice - Discharge - Duty of Fair Representation - Judicial Review - Reconsideration - Applicant alleging that union's decision not to refer discharge grievance to arbitration arbitrary and unlawful - Board satisfied that union did everything reasonable in the circumstances and that its actions not arbitrary - Complaint dismissed - Reconsideration application dismissed - Application for judicial review dismissed by Divisional Court

PATEL, CHAMPUBEN; RE OLRB, AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, LOCAL 551, C.L.C., AFL-CIO AND LEVI-STRAUSS & CO (CANADA) INC.

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Unfair Labour Practice - Duty to Bargain in Good Faith - Practice and Procedure - Interim Relief - Responding employer seeking order requiring non-party to produce certain material described as necessary to preparation of proper response to unfair labour practice complaint - Board concluding that it is inappropriate for it to make a pre-pleading production order - Employer's motion dismissed - Board also vacating summons made returnable at pleading stage as premature

STELCO INC. (HILTON WORKS) ("COMPANY"); RE USWA, LOCAL 1005 ("UNION")...

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Unfair Labour Practice - Interference with Trade Unions - Remedies - Union alleging that in collecting information from bargaining unit members for purposes of making decisions concerning "restructuring", employer had bargained directly with its members and interfered with union's ability to act as bargaining agent - Board dismissing complaint alleging direct bargaining with employees contrary to section 73 of the Act - Complaint alleging interference with union's ability to act as bargaining agent contrary to section 70 of the Act allowed - Board issuing declaration and directing employer to post Board notice in the workplace

CARLETON UNIVERSITY; RE CUPE AND ITS LOCAL 2424

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2577-97-JD United Brotherhood of Carpenters and Joiners of America, Local 446, Applicant v. Labourers' International Union of North America, Local 1036 and BFC Industrial - Nicholls Radtke Ltd., Responding Parties

Construction Industry - Jurisdictional Dispute - Labourers' union and Carpenters' union disputing assignment of tending of carpenters in connection with building of base of cooling tower at Algoma Steel in Sault Ste. Marie - Board concluding that disputed work ought to have been performed by members of Labourers' union

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. Knight* and *G. McMenemy*.

APPEARANCES: *David McKee* and *Gil Scott* for the applicant; *C.M. Mitchell*, *B. Suppa* and *A. Bowker* for the responding party Labourers' International Union of North America, Local 1036; *Gary Robertson* for the responding party BFC Industrial - Nicholls Radtke Ltd.

DECISION OF THE BOARD; February 4, 1998

I. Introduction

1. This is a work assignment complaint brought before the Board pursuant to section 99 of the *Labour Relations Act, 1995*. A consultation with the parties was held before this panel of the Board on January 5, 1998.

2. The work in dispute is described thusly:

All tending of Carpenters relating to construction work being performed by Nicholls-Radtke for Algoma Steel at the #7 Blast Furnace in Sault Ste. Marie. The general work being done involves the building of the base of the cooling tower. The Carpenters are building forms for the base, including constructing panels, putting on walers and strongbacks, and are also constructing scaffolding for the use of other trades who are putting in pipes leading to the cooling tower. The forms are being constructed by the Carpenters in holes in the ground.

The Labourers are currently off-loading materials from supply trucks and stock-piling the material. However, Carpenters helpers under the Labourers' collective agreement are also supposed to then hand the Carpenters needed material from the stockpile. *The specific work in dispute is the tending of Carpenters, which means taking the material from the stockpile to the area where the Carpenters are working.* The company has either declined to assign this work to the Union, or it has assigned it, but when a Labourer performs the work and takes the material to the hole where it is needed by the Carpenters, the Carpenters are ignoring the Labourer and going to the stockpile themselves to get the necessary material. (emphasis added)

Prior to the consultation there was some question raised whether the Labourers' International Union of North America, Local 1036 (hereinafter "the Labourers'") had attempted to broaden the definition of the work in dispute. It was evident to the Board that no such expansion had been intended by the Labourers', and the consultation proceeded on that basis.

3. The responding party BFC Industrial-Nicholls Radtke (hereinafter "Nicholls Radtke") did not file a response or brief of materials as required by the Board's Rules of Procedure. Mr. Robertson, a representative of Nicholls Radtke, attended at the consultation and made submissions before the Board. In essence, Nicholls Radtke supported the position of the applicant. However, as we indicated to Mr. Robertson at the outset of the consultation, the Board has considered in reaching this decision only those submissions made by Mr. Robertson which are supported by the materials filed by the other parties at the consultation.

II. Basic Factual Background

4. Certain undisputed background facts are of assistance here. Nicholls Radtke is the general contractor for the project, which is located at Algoma Steel in Sault Ste. Marie, in Board Area 21. Nicholls Radtke is responsible for the performance of the formwork for the base of the cooling tower in question and is also erecting scaffolding for use by members of other trades who are connecting piping to and from the cooling tower.

5. In mid-March, 1997, Nicholls Radtke convened a mark-up meeting in Sault Ste. Marie to set out the work assignments for this project. At that time, it proposed that the formwork component of the project be assigned to members of the applicant (hereinafter "the Carpenters"), with members of the Labourers' tending. It further proposed that work on the cooling tower be performed by Carpenters' only. The Labourers' disputed this latter proposed assignment. Nicholls Radtke thereupon requested that the Labourers' and Carpenters' submit their evidence to support their respective claims to this work.

6. Shortly thereafter, the Labourers' submitted to Nicholls Radtke certain evidence respecting previous jobs performed by that company, as well as the decision of the Board in *Ecodyne Limited*, [1997] OLRB Rep. Mar/Apr 197. We will have much more to say about this decision below. Ultimately, Nicholls Radtke determined that the final assignment of the work at the cooling tower ought to reflect an assignment to the Carpenters', with the Labourers' tending. It was this assignment which was communicated to the trades in late-April, 1997.

7. The project commenced in May, 1997. The parties agreed that the raw materials from which the forms and scaffolds were installed or erected were stockpiled at various locations around the worksite. It would appear that the stockpiles were located anywhere from zero to 75 feet away from the precise location of any work being performed. There is no dispute that carpenters and carpenters' apprentices performed all of the work associated with the fabrication, erection, and installation of the forms and the erection of the scaffolding. It would also appear that during the course of the project, various carpenters refused to accept materials tended to them by the members of the Labourers', preferring instead to walk to the stockpile to choose the materials themselves.

8. On June 10, 1997, the Labourers' filed a grievance against Nicholls Radtke in which it asserted that the company had failed to assign the work in dispute to its members. That grievance was referred to the Board for arbitration on August 14, 1997. The Carpenters' intervened in that proceeding, and as directed in a decision of the Board adjourning that Board File, this jurisdictional dispute application was filed by the Carpenters'.

III. Decision

9. As has been noted on innumerable occasions, when determining a jurisdictional dispute complaint the Board considers all factors relevant to the proper assignment of the work. As a general observation, the Board has historically given consideration to certain factors which include the following:

- (a) employer practice and preference;
- (b) area practice;
- (c) trade agreements;
- (d) collective agreement obligations;
- (e) trade union constitutions;
- (f) skill, training and safety; and
- (g) economy and efficiency.

In any particular case, one or more of these factors may be of special significance, and will be given greater weight than other factors. For example, in this case, the constitutions of the respective trade unions are not particularly helpful, and have no bearing on the disposition of this proceeding. On the other hand, some considerable significance attaches to the factor of collective agreement obligations, as is described below.

10. One of the difficulties faced by the Board in this case is that of identifying exactly what “tending” means. It became evident from the submissions of the parties that each had a different understanding as to the scope of the meaning of that term. Accordingly, it was submitted by counsel for the Carpenters’ that much of the evidence of employer and area practice was impossible to interpret - that is, that the words “carpenters/labourers tending” found in any particular document could have various meanings, and therefore that the practice referred to by the Labourers’ may, or may not, be supportive of its position. To some extent, that submission has merit. However, as was noted by opposing counsel, the words “labourers tending” must have some meaning, and the position taken by the Carpenters’ has the result of making these words largely redundant, unless they are limited only to moving materials used to make the forms and scaffolds from the truck to a central stockpile. In our view, each and every piece of area and employer practice must be reviewed carefully with this concern in mind, to consider whether it identifies with sufficient particularity the practice of the company in question.

11. We want to make clear, at this juncture, what this decision does not determine. During the course of the consultation reference was made more than once to the suggestion that whether the work in dispute ought to be assigned to members of the Labourers’ or to members of the Carpenters’ depended upon the distance between the stockpile in question and the place where the form or scaffold was being installed or erected. Put another way, if the pile of materials were within a defined “work area” of the carpenter performing the installation or erection of the form or scaffold, he or she could perform the tending work him or herself; but if the pile of materials were outside of that “work area”, a labourer would tend the materials. We do not in this decision venture any comment whatsoever on that proposition, as it is unnecessary to do so.

12. Turning, then, to the merits of the application, we have reviewed very carefully the evidence of employer practice before the Board. There was very little evidence of employer practice filed by the parties. That which was filed was filed by the Labourers’ and supports its claim. There were three separate projects relied upon by the Labourers’ in its brief. The first project, the construction of the Millwater Treatment Facility in Sault Ste. Marie, is sufficiently vague as to be unhelpful, as the minutes of the mark up meeting refer only to “formwork” as having been assigned to “Carpenters/Labourers”. The final jurisdictional assignment for Phases I and II of the Lake Superior Power Cogeneration Plant in Sault Ste. Marie is more helpful. Under the heading of “Forming/Falsework”, labourers’ are stated to be responsible for “carry[ing] forming materials”, and carpenters for “build[ing] and plac[ing] forms”. Although not entirely clear of ambiguity, it appears to us more likely than not that members of the Labourers’ performed the specific work in dispute on that project. Similarly, on Phase III of that Cogeneration Plant, the scaffolding work is identified as being assigned thusly: “carp. erect/dismantle - labourer tending”. In our view, the same conclusion can be reached with regard to this project - that the likelihood is that members of the Labourers’ performed the specific work in dispute in this proceeding on that project. We note here that the employer’s representative at the consultation did not make any submission to the contrary.

13. The Labourers’ put forward as evidence of employer practice Minutes of Settlement dated November 4, 1997, in Board File 2758-97-G, a grievance referral to the Board between the Labourers’ and Nicholls Radtke dealing with the work of tending carpenters and general cleanup at what is known as “the Marley Cooling Towers Project”, at the Algoma Mill site. In essence, the Labourers’ asserted in

that proceeding that Nicholls Radtke had failed to subcontract work under its Provincial ICI collective agreement to a contractor in contractual relations with it, contrary to the provisions of that collective agreement. In the Minutes of Settlement, Nicholls Radtke acknowledges that:

... the work of tending carpenters and general cleanup at the Marley Cooling Towers Project of the Responding Party is the work of the Applicant, and such work ought to have been assigned to members of the Applicant, in accordance with past practice in the area, and the decision of the Board in *Ecodyne Limited*, [1997] OLRB Reports March/April 197.

In our view, this settlement is of little assistance in determining this application. There is no evidence or suggestion that the Carpenters' were made aware of that application, and given the relative time frame of this proceeding and the Marley Cooling Towers proceeding, we do not consider the terms of the Minutes of Settlement to be indicative of an employer or area practice.

14. The evidence of the area practice before the Board suffered from the difficulties identified above in paragraph 10. We do not intend to review the materials filed by the parties at any great length. However, we note here that we have placed no weight whatsoever upon the list of projects contained at Tab F of the Labourers' brief which are asserted to be a list of projects completed in Board Area 21 in the last 30 years in the manner suggested by the Labourers'. Mere assertion of that conclusion and provision of a list of projects is hardly sufficient to establish the proposition relied upon. Having regard to the remainder of the materials before the Board, it would appear that the practice of contractors in performing the work in dispute in Board Area 21 is of a mixed nature. That is, the evidence before the Board indicates that some contractors utilized members of the Labourers' to perform the work in dispute, and some permitted members of the Carpenters' to tend themselves. Quite a bit of the area practice material before the Board is vague and does not support a discernible practice. In fact, some of the area practice evidence submitted by the Labourers' supports the position of the Carpenters', and vice-versa. Accordingly, this factor does not favour the claim made by either party.

15. Turning to the factor of trade agreements, there are no such agreements pertaining to the work in dispute. Counsel for the Carpenters' relied upon an "Area Work Practice Agreement" for Board Area 21, executed by the Carpenters' and the Carpenters' Employer Bargaining Agency, dated October 3, 1991. This Agreement purports to be the result of the application of Article 19.03 of the Carpenters' Provincial ICI Collective Agreement, and confirms the handling of materials from a stockpile designated by a contractor as being work exclusively assigned to members of the Carpenters' in Board Area 21. This document is hardly distinguishable from a unilateral declaration of work assignment and cannot be viewed as supportive of a claim for work as against another trade. To the extent that the document speaks to an area practice in Board Area 21, the document does not assist in establishing an area practice beyond that identified above in paragraph 14.

16. The Labourers' put great weight on the Board's decision in *Ecodyne Limited*, [1997] OLRB Rep. Mar/Apr 197, as supportive of its claim. There are significant parallels to be drawn as between that decision and the facts of this proceeding. In *Ecodyne Limited*, the responding party had obtained a subcontract for the erection of a new water cooling tower at the Algoma Steel Mill in Sault Ste. Marie. The Labourers' and Carpenters' disagreed as to the proper assignment of tending the pairs of carpenters on the site, and the clean-up work associated with the job. In that case, the working carpenter's foreman would select the materials required by the carpenters performing the erection of the cooling tower, and would deliver those materials to the carpenters at the appropriate location.

17. During the course of the Board's decision, the following observations were made:

19. This is a case in which the respective claims to jurisdiction do make a difference. As is apparent from their respective collective agreements, tending (of many trades, not just carpenters) and general clean-up work is part of the core of the work jurisdiction of

construction labourers represented by the Labourers' union. It is not part of the core of the work jurisdiction of the Carpenters' union, although it is an incidental part of it. Accordingly, the collective agreement factor favours the claim of the Labourers'.

Furthermore, the following comments were made by the Board in paragraph 22 of its decision:

Employer preference is generally no more than a "tie-breaker" when an assessment of all relevant considerations favours neither competing trade union. Economy and efficiency can be important considerations, but cannot operate to trump collective bargaining rights. On the contrary, collective bargaining rights and collective agreements, which inevitably affect the manner in which employer's operate, must be given some meaning. Accordingly, it is appropriate for economy and efficiency to give way to the collective agreement factor, particularly when a trade union's core jurisdiction is in issue.

Ultimately, the Board concluded that in Board Area 21, the work in dispute ought to have been assigned to the Labourers'.

18. We are in agreement with the observations made by the Board in *Ecodyne Limited*. In our view, the decision stands for more than that urged upon us by counsel for the Carpenters'. Applied to this proceeding, the result is that the collective agreement factor falls in favour of the Labourers' as well. The work in dispute here is, as in *Ecodyne Limited*, at the "core" of the work jurisdiction of the Labourers'. A review of the Labourers' Provincial ICI collective agreement makes that point evident. In the circumstances, the collective agreement factor strongly favours the claim made by the Labourers'.

19. The parties addressed, as well, the issue of economy and efficiency in the circumstances. The Carpenters' and Nicholls Radtke took the position that there were significant inefficiencies involved in the assignment of this work to the members of the Labourers' union; that either the contractor would be required to keep largely idle labourers on the payroll, or that an insufficient number of labourers would cause delays while members of the Carpenters' awaited delivery of materials by members of the Labourers'.

20. Irrespective of the comment made in *Ecodyne Limited*, cited above, to the effect that economy and efficiency considerations ought not to "trump" collective agreement rights, and that the former factor ought to "give way" to the latter factor (a comment with which we agree), we are not satisfied, on the materials before us, that the economy and efficiency factor is one which would otherwise fall in favour of the Carpenters'. Assuming that the contractor properly monitors the number of labourers required to satisfactorily perform all of the tasks assigned to the Labourers' on the site, there is at least equal legitimacy to the proposition (urged upon us by counsel for the Labourers') that the assignment of tending work to members of the Labourers' can augment the efficiency of the carpenters on site. It is not plainly obvious that the consequences of the division of work reflected by the position taken by the Labourers' is an inefficient use of human resources, with persons "standing around, doing nothing". If the contractor carefully monitors its workforce, such a result is unlikely to occur. Accordingly, this factor does not assist the Carpenters' claim for the work in dispute. If anything, it favours the claim made by the Labourers'.

21. We have, finally, considered the parties' submissions regarding the factor of skill and safety. In our view, on the basis of the materials before the Board, that factor also supports an assignment of the work to members of the Labourers'. Certain issues of safety arise when a carpenter tends for himself or herself, although those same issues do not arise when one or more carpenters tend for other carpenters. On the basis of the materials before the Board, it would appear that Nicholls Radtke permitted members of the Carpenters' to tend for themselves at this project. In our view, the form and scaffolding work is performed more safely if the carpenters performing that work are assisted by other

individuals dedicated to the performance of tending materials. In this case, the safety factor also supports the assignment of the work to a member of the Labourers’.

III. Conclusion

22. In the result, having regard to all of the above factors, we are of the view that the work in dispute ought to have been performed by members of the Labourers’.

1624-96-R The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Locals 599 and 71, Applicants v. **Briar Mechanical Limited and Marcan Mechanical Inc.**, Responding Parties

Certification - Construction Industry - Representation Vote - Union seeking to represent bargaining units of plumbers and plumbers apprentices - Employer asking Board to dismiss certification application under section 11(2) of the Act on basis of untimely delivery of the application contrary to section 7(11) of the Act and Rule 43u of the Rules of Procedure - Employer’s request under section 11(2) of the Act dismissed - Parties disputing voter eligibility status of 3 individuals working on the application date without contract of apprenticeship - Board finding that two of three disputed individuals lawfully employed within meaning of *Trades Qualification and Apprenticeship Act* on application date and eligible to vote - Board finding third disputed individual not lawfully employed within meaning of *Trades Qualification and Apprenticeship Act* on date of application and therefore ineligible to vote

BEFORE: *Inge M. Stamp*, Vice-Chair.

APPEARANCES: *R. C. Arnold, Robert Latreille and Brian Christie* for the applicant; *Hugh R. Scher* for the respondents and *Greg Lennie and Ciro Marrelli* for Marcan Mechanical Inc.

DECISION OF THE BOARD; January 22, 1998

1. This is an application for certification pursuant to the construction industry provisions of the Act. The Board (differently constituted) directed a vote be held of all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Briar Mechanical Limited and Marcan Mechanical Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of Briar Mechanical Limited and Marcan Mechanical Inc. in all other sectors of the construction industry in the the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell (Board Area 15); the County of Simcoe and the District Municipality of Muskoka (Board Area 18), save and except non-working foremen and persons above the rank of non-working foreman.

2. The applicant challenged persons on the voters’ list on the basis they were not qualified, or not at work on the application date, or not performing bargaining unit work, or section 1(3)(b) managerial. Of the nine persons on the voters’ list six voted and those ballots were segregated and sealed.

3. This matter was scheduled for hearing to deal with a number of outstanding issues including who is eligible to vote, the correct name of the responding parties and the bargaining unit description.

4. On the day the vote was held there were six persons who voted. All of the persons were challenged and their ballots were segregated and the ballot box sealed.

5. After having heard the evidence and considered the parties' submissions on the second day of hearing this matter, the Board made the following oral decision:

Having considered the evidence, the submissions of the parties and the cases cited.

- 1) In the circumstances of this case the Board is not persuaded to dismiss this application under section 11.2 of the Act, nor is the Board persuaded to order another vote. Even if the Board were to order another vote the application date would remain the same.
- 2) With respect to Victor Marcelli the Board finds that he was not at work in the bargaining unit on the date of application and is therefore not entitled to vote.

6. Following are reasons for the Board's oral decision on November 13, 1996:

Section 11.2 of the Act provides:

11.(2) Upon the application of an interested person, the Board may dismiss an application for certification of a trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. A trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.

7. The responding parties assert the applicant has violated section 7(11) of the Act and section 43u of the Rules because it delivered the application to the old address. As a result the responding parties did not get the application until September 10, 1996. The Board (differently constituted) issued the decision on September 11, 1996 directing the vote be held on Friday, September 13, 1996. It is the responding party's position it did not have an opportunity to file a response before the Board made its decision with regard to the description of the bargaining unit and the time and place of the representation vote.

8. The bargaining unit descriptions in ICI applications in the construction industry are mandated by legislation. There is no prejudice to the responding parties in these circumstances as it relates to the bargaining unit description.

9. With respect to the vote arrangements there is no assertion that employees did not have notice of the vote, nor are there any submissions from any employees that they were unable to vote.

10. It was not disputed that Victor Marcelli was working in Regina, Saskatchewan on the date of application. Pursuant to the Board's long-standing jurisprudence in construction industry certification applications only persons at work in the bargaining unit on the application date are eligible to vote.

Victor Marcelli is not entitled to vote as he was not at work in the bargaining unit on the application date.

11. Mr. George Dedman, Training Consultant, Ministry of Education and Training testified with respect to the administration of the Rules and Regulations in the plumbing trade. He talked about the ninety day period in which the person is a “prospective apprentice” who is lawfully employed. There was evidence with respect to the changes in the process as it relates to the application of an apprenticeship contract. Under the previous system there appeared to be a two-step process where now there is a one-step process. The “application” and the “apprenticeship contract” is one document or in other words it is now a one step process. Mr. Dedman went on to explain how hours are credited in the trade, the effective date of the contract and the requirement to register as an apprentice within ninety days. Mr. Dedman stated that within this ninety day period the person is legally employed as a non-registered apprentice under the *Trades Qualification and Apprenticeship Act* (“Apprenticeship Act”). Hours are credited whether or not they are worked lawfully. The effective date of the apprenticeship contract is the date of employment. It is Mr. Dedman’s view the longer the period to enter into the apprenticeship contract (up to ninety days) the better the parties are able to assess if the employer and the employee want to pursue this apprenticeship. Mr. Dedman testified as to when the three remaining individuals signed their apprenticeship contracts and the effective date, which is their date of hire.

12. Counsel for the responding party submits the designation calls for journeymen and apprentices in the pipefitting and plumbing trade. It does not refer to “registered apprentices”. Counsel asserts there is a distinction between the established case law concerning the class of apprentices as opposed to registered apprentices.

13. Counsel submits in this application, unlike many of the other applications that have been decided, the specific issue of the work status of an employee employed during the ninety day period prior to the registration under section 9(2) of the Apprenticeship Act is at issue. Is an employee who is lawfully and gainfully employed under the Apprenticeship Act in the trade of plumbing included in the bargaining unit? Is he included in the definition of apprentice under the existing designation by virtue of section 9(2) of the Apprenticeship Act? The employee, an “unregistered apprentice” who is lawfully working on the application date, signs the contract of apprenticeship with an effective date prior to the certification application date. What is the status of this lawfully employed apprentice on the application date?

14. Counsel for the responding party submits the Board must determine the appropriate bargaining unit, whether apprentices must be registered on the date of application in order to be eligible to vote. The Board must consider whether there is a community of interest with others working in the trade pursuant to the designation and those who are working within the ninety day period provided for under the Apprenticeship Act.

15. Counsel submits the Board is not bound by the precise words of a designation order as long as the Board is not inconsistent in its description of an ICI bargaining unit with the relevant designation order. (See *Superior Plumbing & Heating Company Ltd.*, [1986] OLRB Rep. Nov. 1589)

16. Counsel asserts what is different in this case is that the employees at issue became registered apprentices and the effective date of their contract of apprenticeship is prior to the certification application date. Prior to that these individuals were lawfully employed under section 9(2) of the Apprenticeship Act.

17. Counsel points out Local 599, one of the applicants, in Article 112 has a ninety day period in its collective agreement in which apprentices become indentured to the Joint Apprenticeship Board.

18. Counsel for the responding party cited a number of cases including *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594 and *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1563, however these do not deal with the ninety day period under section 9(2). Paragraph 10 of *Naylor Group Incorporated*, *supra*, talks about the effective date of the apprenticeship contract. This evidence is consistent with Mr. Dedman's (See paragraph 13 of *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, *supra*).

19. *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, *supra*, did not address the ninety day grace period, whether they were lawfully employed under section 9(2). The Board in *Naylor Group Incorporated*, *supra*, found they were not at work lawfully under section 10(2), the general prohibition. (See *Naylor Group Incorporated*, *supra*, paragraph 23)

20. Counsel for the responding party cited *C T Windows Limited*, [1983] OLRB Rep. May 627 and the concerns raised in *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, *supra* (See paragraphs 12 and 14). Counsel submits the individuals are doing the same work, they are lawfully at work in the trade and are eligible to vote. By virtue of the contract of apprenticeship they are performing bargaining unit work and are credited with time spent in the past.

21. Counsel asserts the criteria with respect to ratio issues comes into effect when the apprenticeship contracts are signed. Whether there is compliance is for the Ministry to determine and is not relevant to the vote eligibility.

22. The ninety day period is designed for testing the waters and the ratio requirement does not apply. The key factors to be considered are:

- a) were they employees sharing a community of interest?
- b) were they engaged in bargaining unit work?
- c) were they lawfully employed on the application date?
- d) did they take steps as required under section 9(2) to register their apprenticeship within ninety days?

23. Counsel takes the position the individuals were lawfully employed and as such they should not be prevented from participating in the vote.

24. Counsel for the applicant asserts in order to be included in the bargaining unit a person must be a registered apprentice as envisaged by the Apprenticeship Act. The designation order reflects the bargaining unit for which the applicant applied. Counsel referred to *Superior Plumbing & Heating Company Ltd.*, *supra*, where the Board excluded gasfitters relying on the designation.

25. Counsel for the applicant refers to *Gorf Contracting Limited*, [1991] OLRB Rep. April 483 where the Board has said the "community of interest" concept has limited application in the construction industry. Counsel argues that while a person may be lawfully at work under section 9(2) of the Apprenticeship Act and 5.5 of the Plumbers' Regulations, such a person is not an apprentice under the Apprenticeship Act. He is a potential apprentice. Counsel referred to a number of cases dealing with the interpretation and/or application of the Apprenticeship Act in *O. J. Pipelines Incorporated*, [1989] OLRB Rep. Sept. 976, *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, *supra*, *C T Windows Limited*, *supra*, and *Naylor Group Incorporated*, *supra*.

26. Counsel for the applicant submits there is a distinction between compulsory trades and voluntary trades. The Board should conclude since credits given for hours worked in the trade do not

distinguish between hours worked lawfully and hours worked unlawfully the ninety day period is irrelevant. The Board should consider persons who are registered apprentices on the application date. During the ninety day probationary period no journeymen/apprentice ratio is maintained. There is no retroactive pay adjustment. There is no obligation to become an apprentice. To permit a non-registered apprentice to be entitled to be in the bargaining unit on the application date would be contrary to the designation.

27. Counsel for the applicant argues *Naylor Group Incorporated, supra*, dealt with the issue of who is an apprentice, how applications for apprenticeship are entered into, the effective date of the contract of apprenticeship. The Board in *Naylor Group Incorporated, supra*, did not include persons in the bargaining unit who were not registered apprentices.

28. Counsel for the applicant states in *Naylor Group Incorporated, supra*, the issue of the ninety-day period was front and centre. Section 11 of the Sheet Metal Regulations are the same as 5.5 of the Plumbers. In *Heritage Mechanical*, [1995] OLRB Rep. Mar. 272 the comments with respect to the ninety day period were obiter and contrary to ten years of Board jurisprudence. Counsel submits the Board should follow *Naylor Group Incorporated, supra*, and the cases referred to in that decision. The applicant asserts accepting persons who were not registered apprentices on the date of application would change the interpretation of the Apprenticeship Act's application to the *Labour Relations Act* and the designation for the last ten years. There would be no degree of certainty on the application date. It would create chaos. The Board is urged not to change its practice.

29. Counsel for the applicant submits the Board has addressed the element of the apparent unfairness of persons who claim to be in the bargaining unit and are not allowed to vote in *Turn-Key Installations Inc.*, [1992] OLRB Rep. Jan. 90. After the certificate is granted anyone can continue to work in the bargaining unit provided they are journeymen or registered apprentices in the trade.

30. With respect to the evidence regarding the three individuals the applicant submits Mario Giardinazzo started on June 4 and on September 4 (the application date) was employed ninety-two days. The applicant has filed *prima facie* evidence that he was not at work on the application date. He received no pay for the week ending September 6. Three months would be September 3, ninety days was Mr. Dedman's own interpretation. On September 26 when Mario Giardinazzo signed his contract of apprenticeship, either he or Philip Minervino should not have been hired because the required ratio no longer existed. Philip Minervino was given an apprenticeship contract based on incorrect information. Instead of seven plumbers there were only four. When Tardif and Vezina left there were only two. Debiasio was given an apprenticeship contract when there were clearly only two journeymen plumbers in the week ending October 4. Ciro Marcelli is not on the list, he is the employer. The contracts of apprenticeship were improperly obtained.

31. Counsel for the applicant asserts there is no cogent reason not to follow *Naylor Group Incorporated, supra*, decision. The only route to certainty is to continue to determine apprentice status under the Apprenticeship Act. If the Board opens the door to persons other than registered apprentices each case will require more and more enquiries as to what people were doing, their status, whether they were lawfully at work in the trade.

32. Counsel for the responding party in reply submits *Irvcon Roofing & Sheet Metal (Pembroke) Ltd., supra*, has been wrongfully decided. The employees must be lawfully employed in their trade under the Apprenticeship Act and apply within three months. There is a distinction between voluntary and compulsory trades. In a compulsory trade there are qualifications set out in the Act. Within ninety days individuals are working lawfully under the Apprenticeship Act. Counsel submits the individuals were lawfully employed in the trade as unregistered apprentices on the application date. The effective date of their contract is prior to the application date. For these reasons there can be no issue with respect

to their status as employees on the application date and their eligibility to vote. To ensure certainty and success in the apprenticeship program it is important to interpret the Apprenticeship Act as the legislature intended it to ensure the letter as well as the spirit of the legislation be adhered to. These individuals are apprentices and eligible to vote in the bargaining unit as was the case in *CT Windows Limited*, *supra*, employees doing lawful work in the trade under their statute.

Decision

33. The Board has addressed the community of interest issue in the construction industry in a number of Board decision. In *P & M Electric* (1982) Ltd., [1989] OLRB Rep. June 638, the Board stated:

10. In our view, it would be inconsistent with the *Apprenticeship and Tradesmen's Qualification Act* for the Board to find that persons who are neither qualified journeyman nor apprentices, within the meaning of that legislation, to be in a bargaining unit which relates to a compulsory certified trade for the purpose of certification proceedings before the Board. Further, the issue of community of interest in trade or craft bargaining units is determined primarily on the basis of the skills and working conditions which are characteristic of employees engaged in that craft or trade. In the construction industry, the community of interest question has largely been resolved by the development and operation of businesses and trade unions in that industry along trade or craft lines. Both the structure of the *Labour Relations Act* and the Board's approach to the construction industry recognize that (see *Ellis Don Limited*, [1988] OLRB Rep. Dec. 1254, particularly at paragraphs 37-46). In our view, it would make no labour relations sense to include in a construction industry bargaining unit which relates to a compulsory certified trade, for the purpose of certification proceedings under the *Labour Relations Act*, persons who cannot lawfully work in the bargaining unit before or after certification and who share no real community of interest with electricians who are entitled to work in that trade pursuant to the *Apprenticeship and Tradesmen's Qualification Act*.

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34. All of the Board's decisions cited above dealing with the status of an individual on the application date as it relates to the Apprenticeship Act focus on whether they are lawfully working in the trade. In this case the question involves a compulsory trade which requires persons working in the trade to be journeymen or apprentices.

35. The remaining three persons which are in dispute were working on the application date without a contract of apprenticeship. The parties agreed, for the purpose of making their argument it is assumed the three individuals were performing bargaining unit work on the application date.

36. On the application date, September 4, 1996 P. Debiasio, P. Minervino and M. Giardinazzo were at work without a contract of apprenticeship. This raises the question of whether these three individuals are eligible to vote. The applicant's position is unless they are registered apprentices or journeymen pursuant to the Apprenticeship Act they are not eligible to vote. The responding party asserts the Board, when interpreting the Apprenticeship Act as it relates to the *Labour Relations Act*, 1995, must have regard to section 9 of the Apprenticeship Act which provides for a grace period of three months. During this period a person is lawfully employed (under the Apprenticeship Act) in the trade, in this case a compulsory trade and therefore eligible to vote as an employee in the bargaining unit on the application date.

37. The Board in paragraphs 36 and 37 of *Heritage Mechanical*, [1995] OLRB Rep. Mar. 272 made the following comment:

36. Further, as the Board pointed out in *O. J. Pipelines Incorporated*, *supra*, (and in *P & M Electric* (1982) Ltd., OLRB Rep. June 638), the Board applies the *Trades Qualification Act* and regulations to its proceedings but it does not, and does not have the jurisdiction to, enforce or administer that

Legislation as such. Consequently, for purposes of an application for certification, the Board is concerned with the *status* of employees under the *Trades Qualification Act* and regulations; in this case, whether they were journeymen or registered apprentice sheet metal workers on the certification application date. On the evidence before the Board in this case, both Goodlet and Drake were registered apprentice sheet metal workers. Whether or not they were wrongly registered is not a matter for this Board. Further, on the evidence, only one of the two was wrongly registered at most, and even if one was wrongly registered any cancellation or voiding of the contract of apprenticeship would not have a retroactive effect.

37. Finally, we observe that Goodlet and Drake would properly be included on the list of employees in the application for certification even if neither had been registered apprentice sheet metal workers on the certification application date. Section 9 of the *Trades Qualification Act* appears to permit a person to work at a trade for which an apprenticeship training program is established without a certificate of apprenticeship or qualification in the trade for up to three months. Accordingly, a person who is not a journeyman or registered apprentice may lawfully work in a compulsory certified trade for up to three months, and is therefore properly included on the list of employees for certification purposes for up to three months from the day s/he begins work in the trade. In this case, both Goodlet and Drake had worked for the responding employer for less than three months at the time the application for certification was made and would therefore be properly included on the list of employees in the bargaining unit even if they had not been registered as apprentice sheet metal workers.

38. The relevant sections of the *Trades Qualification and Apprenticeship Act* provide as follows:

1. In this Act,

“apprentice” means a person who is at least sixteen years of age and who has entered into a contract under which the person is to receive, from or through his or her employer, training and instruction in a trade;

“certified trade” means a trade designated as a certified trade under section 10.

9.-(1) Every person who commences to work at a trade for which an apprentice training program is established but who does not hold a certificate of apprenticeship or qualification in that trade shall,

- (a) forthwith apply in the prescribed form for apprenticeship in that trade; and
- (b) within three months after commencing to work in that trade, file with the Director his or her contract of apprenticeship.

(2) Every person who fails to comply with subsection (1) shall, upon the expiration of the period of three months mentioned in clause (1) (b), cease to work in that trade until the person files with the Director his or her contract of apprenticeship or until the Director authorizes in writing the continuation or resumption of such work.

10.-(1) The Lieutenant Governor in Council may designate any trade as a certified trade for the purposes of this Act, and may provide for separate branches or classifications within the trade.

(2) No person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), shall work or be employed in a certified trade unless he or she holds a subsisting certificate of qualification in the certified trade.

(3) No person shall employ any person, other than an apprentice or a person of a class that is exempt from this section or a person referred to in subsection (4), in a certified trade unless the person employed holds a subsisting certificate of qualification in the certified trade.

(4) When a trade is certified under subsection (1), a person who is working in the trade at the time that it is certified shall be allowed a period of two years from the first day of the month following

the month in which the trade is certified to qualify for a certificate of qualification in the trade, if the person,

- (a) is the holder of a certificate of apprenticeship in the trade; or
- (b) satisfies the Director that he or she has been continuously engaged as a journeyman in the trade for a period of time in excess of the apprenticeship period for the trade; or
- (c) satisfies the Director that he or she is qualified to work in the trade and meets such other requirements as the Director may prescribe.

11. In addition, section 5 of Regulation 1073 ("Plumber") under the *Apprenticeship Act* provides that:

5. A person is exempt from subsection 10(2) of the Act if he or she,

- (a) applies in the prescribed form for apprenticeship in the certified trade; and
- (b) works in that trade for three months or less.

39. The Board has dealt with this issue in *Marsil Mechanical Inc.*, [1997] OLRB Rep. July/Aug. 636 and had this to say with respect to the Board's jurisprudence in the earlier cases:

12. The trades of plumber (Regulation 1073) and steamfitter (Regulation 1079) are compulsory certified trades under the *Apprenticeship Act*. This means that only persons who are qualified journeymen or apprentices in these trades, within the meaning of the *Apprenticeship Act*, may lawfully perform the work of a plumber or steamfitter. But this requirement is subject to exceptions specified in the *Apprentice Act* or the Regulations under the Act which are specific to the trade. In *O.J. Pipelines Inc.*, [1989] OLRB Rep. Sept. 976, an application for certification by U.A., Local 800 from which the Board quoted at length in *Heritage Mechanical*, *supra*, the Board explained it this way:

6. Although section 6(1) of the *Labour Relations Act* gives the Board a discretion in determining "the unit of employees that is appropriate for collective bargaining", that discretion is limited in applications for certification in the construction industry by sections 6(3), 119, 139 and 144 of the Act [as they then were]. All applications for certification in the construction industry must be made pursuant to sections 119 and 144 (*Clarence H. Graham Limited*, [1981] OLRB Rep. Sept. 1195; *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction Limited*, [1983] OLRB Rep. March 407 and July 1104; *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254 and [1989] OLRB Rep. March 234; *Wraymar Construction and Rental Sales Ltd.*, [1989] OLRB Rep. June 682). Under the province-wide bargaining provisions of the Act, there are organizations of trade unions, called designated employee bargaining agencies, which are designated to represent in the industrial, commercial and institutional ("ICI") sector of the construction industry those employees in certain specified trades or crafts (for our purposes those terms are synonymous) who are represented by the trade unions, known as affiliated bargaining agents, which constitute them. A trade union which is an affiliated bargaining agent of a designated employee bargaining agency may, at its option, apply for certification under either section 144(1) or (3), or enter into voluntary recognition agreements under section 144(4). Trade unions which are not represented by a designated employee bargaining agency, and which are therefore not affiliated bargaining agents to which sections 144(1) through (4) of the Act apply (such as the Christian Labour Association of Canada) can apply for certification or enter into voluntary recognition agreements in the construction industry under section 144(5).

7. The designation orders issued pursuant to section 139(1) of the Act describe the provincial units of employees for the province-wide collective bargaining scheme established by the Act for the ICI sector of the construction industry in terms of trades, and

designate, for each such provincial bargaining unit, an employer and an employee bargaining agency. In effect, such designation orders designate the trades which “belong” to each employee bargaining agency and its affiliated bargaining agents for purposes of the province-wide collective bargaining scheme. In the result, employee bargaining agencies and their affiliated bargaining agents can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent (*Ninco Construction Ltd.*, *supra*; *Manacon Construction Limited*, *supra*; *Superior Plumbing & Heating Ltd.*, [1986] OLRB Rep. Nov. 1589; *D. E. Witmer Plumbing and Heating Limited*, [1987] OLRB Rep. Oct. 1228; *Ellis-Don Limited*, *supra*; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Indeed, the structure of the Act requires an affiliated bargaining agent to seek bargaining rights for all employees in the trade(s) which its employee bargaining agency has been designated to represent in bargaining in the ICI sector (in the pertinent designation order) when making an application for certification which relates to that sector (*Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924; *Kraft Construction Company (1978) Ltd.*, [1989] OLRB Rep. Feb. 169; *Wraymar Construction and Rental Sales Ltd.*, *supra*). Consequently, in applications for certification under section 144(1), the Board, although not necessarily bound to use the precise words of the designation order, cannot describe a bargaining unit which relates to the ICI sector in a manner which is inconsistent with the applicable designation order. To accommodate the designation system, and recognizing that trade union representation in the construction industry has historically been along trade lines, the Board’s practice, in applications under section 144(1), is to describe bargaining units in terms of the relevant trade and to use the words of the applicable designation order.

8. Pursuant to the designation order referred to in paragraph 1 above, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the Ontario Pipe Trades Council of the United Association of the Plumbing and Pipefitting Industry of the United States and Canada, has been designated to represent in bargaining in the ICI sector of the construction industry” all Journeymen and Apprentice Plumbers and Pipefitters” represented by its affiliated bargaining agents.

In paragraph 9 of that decision the Board set out the definitions of “apprentice” and “certified trade” and the provisions in what are now sections 1, 9 and 10 of the *Apprenticeship Act* as set out above, and then continued as follows:

10. It is evident from the Board’s decisions in cases like *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594; *C.T. Windows Limited*, [1982] OLRB Rep. Nov. 1597 and [1983] OLRB Rep. May 627; *Mechanical Insulations Roofing & Siding Ltd.*, [1985] OLRB Rep. April 549; *Naylor Group Incorporated*, [1986] OLRB Rep. Nov. 1563; *Phase IV (4) Electrical Contractors Limited*, Board File No. 2792-87-R, unreported decisions dated March 25, 1988 and July 5, 1988), and *B. C. Meck*, [1988] OLRB Rep. June 546 that the focus of the Board’s concern in applications for certification relating to bargaining units described in terms of compulsory certified trades is that persons working or employed in such trades be lawfully so engaged before they are considered to be employees for certification purposes. Consequently, the Board has applied the *Apprenticeship and Tradesmen’s Qualification Act* in such cases in determining the list of employees in such bargaining units for certification purposes.

11. Pursuant to Regulations 52 and 59 (R.R.O. 1980) respectively under the *Apprenticeship and Tradesmen’s Qualification Act*, the trades of “plumber” and “steamfitter” are compulsory certified trades. The Board has determined that the labels “pipefitter” and “steamfitter” are synonymous for purposes of the *Labour Relations Act* (*D. E. Witmer Plumbing and Heating Limited*, *supra*, at paragraph 9). Consequently, a person must be either a journeyman or apprentice in the plumbing or steamfitting trades within the meaning of the *Apprenticeship and Tradesmen’s Qualification Act* to be able to lawfully work or be employed as a plumber or steamfitter respectively in the Province of Ontario.

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14. When it comes to the *Apprenticeship Act*, the concern of the Board has been that employees are lawfully at work at the times material to the Board's considerations in applications for certification. Accordingly, as decisions like *C.T. Windows Limited*, [1983] OLRB Rep. May 627 demonstrate, for purposes of an application for certification, the *Apprenticeship Act* is irrelevant when it comes to trades which are not compulsory certified trades. On the other hand, in more than 15 years of jurisprudence (beginning with *Irvcon Roofing & Sheet Metal (Pembroke) Ltd.*, [1981] OLRB Rep. Nov. 1594), the Board has consistently applied the *Apprenticeship Act* when it comes to employees engaged in compulsory certified trades by asking the question: were those employees lawfully engaged in that trade at the material times?

15. Clearly, an employee who holds an appropriate certificate of qualification in a compulsory certified trade can lawfully work in that trade. So can an employee who has entered into a contract of apprenticeship in the appropriate form which has been duly signed and approved by the Director of Apprenticeship. Section 17 of the current *Apprenticeship Act* provides that upon approval every contract of apprenticeship shall be registered by the Director.

16. Earlier on, in decisions like *Irvcon*, *supra*, the Board spoke in terms of registered apprentices, and expressed an apparent concern that bargaining units consisting of employees in compulsory certified trades be limited to employees who would be able to continue as employees in the bargaining unit after certification. In that respect, the Board suggested that persons who were not or did not become registered apprentices in the trade would not be able to continue as employees. With respect, that is both not necessarily the case and obscures the reason for the Board's concerns about the status of employees under the *Apprenticeship Act*. Similarly, I respectfully suggest that the Board in the *Naylor Group Incorporated*, *supra*, case did not directly address the question suggested by what is now section 9(2) of the *Apprenticeship Act*, although it did address a provision in an applicable Regulation to the same effect, even though that issue was squarely before the Board in that case. To the extent that that decision suggests that *only* employees who are journeymen or apprentices (as defined in the *Apprenticeship Act*) can lawfully work in a compulsory certified trade, and that only those employees should be included in a bargaining unit which consists of employees in a compulsory certified trade, I respectfully disagree.

17. The Board's functions do not include administering or enforcing the *Apprenticeship Act* as such. In applying the *Apprenticeship Act* in applications for certification or other proceedings (jurisdictional disputes, for example), the Board is concerned only with the *status* of employees under the *Apprenticeship Act* for purposes of the *Labour Relations Act, 1995*. It is patently obvious that under the *Apprenticeship Act* there are persons other than certified journeymen or registered apprentices who can lawfully work or be employed in even a compulsory certified trade.

18. It is true that under the *Apprenticeship Act* "apprentice" is in effect defined as being a person who has entered into a contract of apprenticeship, and that section 10(2) provides that no one other than an apprentice or person exempted under section 10(4) can work or be employed in a compulsory certified trade unless s/he is a certified journeyman. However, section 9(1) contemplates that a person can commence work in a trade without being either an "apprentice" as defined in the *Apprenticeship Act* or a certified journeyman, provided that such a person must "forthwith" apply to become an apprentice and within three months of commencing work in a trade file a contract of apprenticeship with the Director. Section 9(2) goes on to provide that a person who does not comply with section 9(1) within three months must *then* stop working in the trade until s/he either files a contract of apprenticeship with the Director, or the Director gives written authorization for that person to continue or resume work in the trade. It is apparent that the definitions and the provisions of sections 9 and 10 of the *Apprenticeship Act* must be read together, and that section 9 in effect provides a three month grace period for persons to become apprentices in the trade. Similarly, the requirement that a person "forthwith" apply for apprenticeship in a trade must be read in context, and requires only that a person do the things required to become an apprentice in the trade within three months of starting work in it. If s/he does so that is "forthwith" enough. Read as a whole, the *Apprenticeship Act* contemplates that a person who is neither an apprentice nor a journeyman in a compulsory certified trade can lawfully work or be employed in that trade for up to three months, or even for such longer period as the Director may authorize in writing. Accordingly, for the Board's purposes in an application for certification, a person who is neither an apprentice nor a journeyman in a compulsory certified trade but who has been working or employed in that trade for not more than three months has the status of an employee who is properly included in a bargaining unit which includes employees in the trade.

19. In the case of plumbers and steamfitters, the trades in issue in this proceeding, section 5 of the respective regulations for those trades make that even clearer, in that they specifically exempt persons who have been engaged in either trade for three months or less from the prohibition in section 10(2) of the Act, something which section 26 of the *Apprenticeship Act* provides can be done by regulation (see paragraph 11, above).

20. Further, any concern regarding the post-certification (or indeed the post-date of application) status of employees in Board decisions in the construction industry which were made prior to 1987, which includes both *Irvcon*, *supra*, and *Naylor Group Incorporated*, *supra*, must be read in the context of the Board's overall approach to construction industry applications for certification. It was not until the Board's decisions in *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41 and *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 that the Board settled on the certification application date as being the only relevant date for purposes of determining the number and identity of employees in a construction industry bargaining unit for purposes of an application for certification (or for an application for terminating the bargaining rights). Since then, the Board has consistently applied the date of application test in that respect, and as recently reviewed in *Ken Anderson Electric Inc.*, [1996] OLRB Rep. Oct. 846, has extended its application to determining voter eligibility in construction representation proceedings. Accordingly, events which occur after the date of application, whether these relate to the *Apprenticeship Act*, to a voluntary or involuntary termination of employment, or otherwise affect a person's employee status, are irrelevant to the Board's considerations concerning a person's employee status on the date of application. The question is whether the status of a person is that of an employee lawfully working in the bargaining unit on the date of application, not what his/her status was on some previous date, or what it might be at some future time.

21. In argument, counsel for the U.A. referred to the employee bargaining agency designation for the U.A. and reminded the Board that this designation is for all journeymen and *apprentice* plumbers. Accordingly, argued counsel, anyone who is not an apprentice, within the meaning of the *Apprenticeship Act* cannot be included in the bargaining unit. In effect, the U.A. submits that being an apprentice within the meaning of its designation order requires more than merely working in the trade.

22. Many designations, both with respect to compulsory certified trades and trades which are not, are expressed in terms of journeymen and apprentices in the trade. For trades which section 10(2) of the *Apprenticeship Act* does not apply (i.e. non-compulsory certified trades) this has been liberally interpreted to require only that employees be working in the trade. For compulsory certified trades, it has been interpreted as requiring that an employee be lawfully engaged in the trade under the *Apprenticeship Act*. That is, where the term "apprentices" appears in a designation order, it has been liberally construed, and interpreted in accordance with what is required or permitted under the *Apprenticeship Act*. Accordingly, the terms of the designation orders, or more specifically the U.A. designation order, adds nothing to the analysis of this particular issue.

23. Further, the fact that Marsil may have been "out of ratio" on the date of application is irrelevant to the Board's considerations in an application for certification. First of all, this issue was not raised until the morning of the first day of hearing on April 28, 1997 (two full months after the vote was held), and as such it is untimely. Second, questions concerning the apprentice to journeyman ratio are matters of enforcement and administration of the *Apprenticeship Act*, something over which this Board has no jurisdiction. The fact that an employer is out of ratio does not affect the status of an employee of that employer under the *Apprenticeship Act*.

40. In interpreting the *Apprenticeship Act* for the purposes of the *Labour Relations Act, 1995* the Board's focus is on who is lawfully at work in the bargaining unit on the application date in the particular trade. On the application date who was lawfully at work in the bargaining unit and therefore eligible to vote? Mr. P. Debiasio and Mr. P. Minervino started to work for Marcan on August 28, 1996. On the application date, September 4, 1996 pursuant to Article 9 of the *Apprenticeship Act* they were lawfully at work in the trade, in the bargaining unit on the application date. Subject to any other challenges Mr. P. Debiasio and Mr. P. Minervino are eligible to vote.

41. The Labour Relations Board has no control over the administration or enforcement of the Apprenticeship Act. Section 9(2) is directory and requires a person to cease working in the trade after three months if no contract has been filed. The fact that contracts have been filed subsequent to the application date is not relevant to the determination of status on the application date. What is relevant is whether they were lawfully at work in the trade on the certification application date.

42. Mr. Dedman the Training Consultant of the Ministry of Education and Training in his evidence described the grace period as ninety days. The Apprenticeship Act however refers to three months. Mr. Mario Giardinazzo commenced working with Marcan on June 4, 1996. The day his apprenticeship contract was registered on September 26, 1996 was after the expiry of the ninety days or the three months. On September 4, it was ninety-three days since Mr. Giardinazzo started to work in the trade with Marcan. The three months grace period expired on September 3. On September 4, Mr. Giardinazzo was no longer lawfully employed pursuant to section 9(2) of the Apprenticeship Act and therefore not eligible to vote.

43. With respect to the applicant's submissions that the apprentice to journeymen ratio was not properly applied and therefore one of the contracts of apprenticeship should not have been entered into, the Board agrees with the comments of paragraph 23 of *Marsil, supra*. It is a matter of enforcement and administration of the Apprenticeship Act. This Board does not have jurisdiction over the enforcement of the Apprenticeship Act.

44. There are some additional outstanding issues. The correct name of the employer and further challenges with respect to individuals found to be eligible to vote. The parties had agreed to assume the individuals were doing bargaining unit work for the purpose of dealing with the Apprenticeship Act.

45. No section 1(4) application was filed. Given the responding party's representations that Marcan is the employer and Briar is no longer operating, the applicant is directed to advise the Board if this issue is still outstanding.

46. The applicant in its submissions makes reference to "further canvass the nature of the work performed" by the challenged individuals in the event the Board found they were entitled to vote under the Apprenticeship Act. There were no specific pleadings or allegations on which the applicant intends to rely as to what work it says these persons performed. In light of the above the parties are directed to advise the Board if any of these issues are still outstanding. If there are no outstanding issues, arrangements will be made to count the ballots. If there are outstanding issues the party making the assertions is directed to plead the facts it intends to rely on.

3040-96-U Canadian Union of Public Employees and its Local 2424, Applicant v. Carleton University, Responding Party

Interference with Trade Unions - Remedies - Unfair Labour Practice - Union alleging that in collecting information from bargaining unit members for purposes of making decisions concerning "restructuring", employer had bargained directly with its members and interfered with union's ability to act as bargaining agent - Board dismissing complaint alleging direct bargaining with employees contrary to section 73 of the Act - Complaint alleging interference with union's ability to act as bargaining agent contrary to section 70 of the Act allowed - Board issuing declaration and directing employer to post Board notice in the workplace

BEFORE: Kevin Whitaker, Vice-Chair.

APPEARANCES: *Ainslie Benedict, Marni Jordan, Kelly Lewis, Wayne Thomas and Ian Babcock* for the applicant; *George Rontiris and Coralie Bartley* for the responding party.

DECISION OF THE BOARD; January 29, 1998

I

What this case is about

1. This case is about obligations owed to a bargaining agent where an employer embarks on a restructuring exercise. Increasingly, employers are radically restructuring their enterprises. The reasons behind this trend are varied.

2. Public sector employers are not immune to these general trends. Many are experiencing reductions in government funding levels. For large employers, restructuring plans often include a phase which requires a detailed audit of the way in which work is performed. Depending on the nature of the business, these audits may require fairly elaborate methods of information collection. Not surprisingly, employers often wish to obtain information about work processes directly from the persons who do the work - their employees. These situations raise difficult questions about the role of unions in restructuring processes and the degree to which an employer's attempt to "speak" directly to its employees about work "fits" within a collective bargaining regime.

3. This is an application pursuant to section 96 of the *Labour Relations Act, 1995* (the "Act"). The applicant alleges that the respondent has breached sections 70 and 73(1) of the Act. The thrust of the applicant's case is that in collecting information from bargaining unit members for purposes of making decisions concerning restructuring, the respondent has bargained directly with its members and more generally, interfered with the ability of the applicant trade union to act as bargaining agent.

4. This matter was heard on May 7 and 8, 1997 by a panel of the Board consisting of myself, D. A. Patterson and S. C. Laing. At the conclusion of the hearing on May 8, the Board adjourned to consider the parties' submissions and then reconvened to issue an unanimous oral ruling that the application with respect to section 73(1) of the Act was dismissed and the application with respect to section 70 of the Act was allowed. The issue of remedy was reserved.

5. Since the Board's oral ruling on May 8, 1997, Board Member S. C. Laing (as she then was) has been appointed a Vice-Chair of the Board. For this reason she is unable to continue to sit as a member of the panel of the Board in this matter. As a result and pursuant to section 110 (12) of the Act, the reasons which comprise of the balance of this decision are being issued by the Vice-Chair of the panel.

II

The Facts

6. Few if any facts are in dispute. The respondent is a large public university located in Ottawa. The applicant represents approximately 600 employees of the respondent. Bargaining unit members are engaged in administrative support and library services. The majority are full-time employees. The applicant is one of seven locals on the respondent's campus affiliated with the Canadian Union of Public Employees ("CUPE").

7. Like many public and private institutions, the respondent has recently engaged in a restructuring exercise designed to improve the way it goes about its business. The stated goals are to reduce

costs, improve levels of service and to create a more rewarding work experience. The reasons for this but include funding pressures.

8. The restructuring exercise has a number of discrete parts. The portion which is the subject matter of this application is entitled the Working Group on Administrative Renewal ("WGAR"). WGAR was initiated as its name suggests, to examine and recommend changes to the organizational and operational aspects of the respondent's administrative structures. It was commenced in the fall of 1996 following an earlier review (begun in the spring, and to have reported in the fall of 1996) of academic processes called the Working Group on Renewal.

9. In the early summer of 1996, the respondent appointed a new President, Mr. Richard Van Loon. In August, 1996, Mr. Van Loon decided that it would be appropriate to begin a review process (which would become WGAR), to complement the academic review process. He approached for assistance, Mr. Duncan Watt, Associate Vice-President of Finance and Administration.

10. Mr. Watt was the only witness called by the respondent. He explained that following his initial conversation with Mr. Van Loon in August, he began to prepare draft terms of reference for the new process. Mr. Watt was assisted in this by a group of six other people who would eventually all come to be appointed to the WGAR. Draft terms of reference were presented to Mr. Van Loon in late September. Shortly after, they were approved by the respondent's Senior Planning Committee. Mr. Watt testified that while the group of seven individuals involved in the exercise spent a fair bit of time thinking about the terms of reference, no thought was given to how the review process would be carried out or more particularly, whether the applicant would play a role in the process.

11. The "Mandate" and "Scope" of the review are set out as follows in the terms of reference:

1. Mandate

The Working Group on Administrative Renewal was formed by the President to complement the academic review of the Working Group on Renewal. It will examine and recommend changes to the organizational and Operational aspects of Carleton University's administrative structures where such changes are required to support the recommendations of the Working Group on Renewal or to increase the efficiency and effectiveness of operations.

The principal tasks of the Working Group are:

- a) to examine the structure of all administrative operations and students support areas;
- b) to make recommendations concerning administrative structures, performance targets, and other matters required to achieve the goals and targets of the Working Group on Renewal; and
- c) to make comparisons with administrative structures in other universities.

The Working Group will call for written submissions from all members of the University community. It will meet with each Resource Planning Committee and with other individuals and groups who make written submissions as the Working Group deems necessary.

2. Scope

The administrative function of all units will be considered in relation to their place in the structure of the University, giving due weight to the educational values of the University. Overall effectiveness will be gauged in the light of the targets and goals arising out of the report of the Working Group on Renewal and through comparisons with other universities. Goals with respect to service, cost recovery and profit will be formulated as applicable. The Working Group will consider opportunities for structural changes where such changes will best assist the University in its

implementation of the recommendations of the Working Group on Renewal or where such changes will improve the effectiveness and efficiency of the existing operation. This review is also intended to complement the work of the process redesign teams and to provide guidance as to future areas for process redesign.

12. Ms. Marni Jordan was President of the applicant in the fall of 1996 and one of four witnesses called by the applicant. She stated in her evidence that while there were rumours in the fall of 1996 about the WGAR process, it was not until October 22, 1996 that the applicant was formally advised about the initiative. On that day, at the respondent's behest, the parties met to discuss the project. At the meeting, the respondent presented the applicant with a copy of the terms of reference.

13. One month earlier, the parties had settled a prior Board application. In that matter, the applicant had alleged that an earlier discrete portion of the respondent's broader restructuring exercise had been conducted in a manner which breached the Act. The prior complaint had been made as a result of the applicant's concerns about not being involved in restructuring processes that had preceded the WGAR.

14. Ms. Jordan testified that in the context of the recent settlement and the discussions which eventually resolved that matter, she anticipated that the respondent would invite the applicant to participate in the new WGAR process at the October 22 meeting.

15. At the meeting which took place on October 22, the respondent informed the applicant of its plans. It presented the finalized terms of reference for information purposes, but not as a matter to be negotiated. The respondent explained that it would seek information from employees in three ways: by solicitation of submissions generally, by inviting particular individuals to meet with the committee and by the use of a questionnaire.

16. At the meeting on October 22, the applicant was not provided with a copy of the questionnaire or a draft of the call for submissions which would be published in the local university newspaper. Mr. Watt acknowledged in his evidence that at this meeting, the applicant raised concerns about the propriety of the respondent going directly to bargaining unit members with such a questionnaire. The applicant suggested that the questionnaire be distributed and sent through it. Ms. Jordan testified that at the end of the meeting, she believed that the respondent had undertaken to come back with responses to the applicant's concerns before any further steps were taken. Mr. Watt's recollection was different. He did not believe that such an undertaking had been given.

17. The next communication between the parties occurred on October 28, 1996. At that time, Mr. Watt sent a memo to the applicant soliciting its views on an enclosed draft "Call for Proposals". Mr. Watt indicated that he needed the applicant's comments within two days as the draft would be published in the campus newspaper later that week. The applicant advised Mr. Watt that it could not reply within the tight time frame provided. The document was published three days later on October 31, 1996 without the applicant's input.

18. The respondent sent out approximately 100 questionnaires. Most of these were sent to bargaining unit members. This figure represents approximately one-sixth of the applicant's membership. Following the distribution of the questionnaire, the respondent scheduled information sessions for those asked to respond. Information sessions were scheduled for November 4 and 8, 1996.

19. Ms. Jordan testified that when the applicant's members received the questionnaire, a number of them were concerned about the content of some of the questions. The concerns were that the questions touched on matters that might be viewed as collective bargaining issues. Some members felt that these issues should be discussed directly with the applicant rather than with employees through the device of a questionnaire.

20. The applicant requested permission to attend the information session on November 4, 1996. The request was refused. Mr. Watt felt the applicant's participation would be inappropriate despite the fact that he understood that the applicant believed that its members' interests were being affected by the process.

21. At the meetings on November 4 and 8, 1996, Mr. Watt was told by some employees that they were uncomfortable with the process. Their discomfort stemmed from both the subject matter of the meeting and the fact that the applicant was not permitted to participate in the session. In response to a question at the meeting on November 8, 1996, Mr. Watt indicated that while the questionnaire itself was not intended to determine where lay-offs would occur, the recommendations which would result in part from responses to the questionnaire, could result in lay-offs.

22. As a result of being excluded from the information sessions, the applicant convened its own meeting to discuss its position on the process and questionnaire with its members. The meeting was scheduled for November 14, 1996. On November 11, 1996, the applicant wrote to members of management indicating that it had been barred from attending information sessions held in the beginning of November, that they were holding their own meeting on November 14, and requesting that the questionnaire not be dealt with until after the November 14 meeting. At the meeting on November 14, 1996, the applicant advised its members that if they wished, they could respond to particular questions on the questionnaire by indicating that those issues be referred to the bargaining agent.

23. The applicant along with the other unions affiliated with CUPE presented the respondent with a joint submission dealing with both the academic and administrative review processes. These were discussed at a meeting on December 11, 1996 attended by the applicant, the respondent and other unions. Through their submission, the applicant and other unions declined to comment on some aspects of the questionnaire on the grounds that the issues raised, touched upon matters which were properly the subject of collective bargaining.

24. The questions which were of concern to the applicant were as follows:

6. What services do you acquire from agencies/suppliers outside the University? Outline the nature of these services and the annual cost of these services. How do you determine the effectiveness of the services that are acquired externally?
7. Are there any institutional impediments that hinder the ability of your unit to provide services? If possible, please provide suggestions for improvement.

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9. Are there any specific services that your unit provides that could or should be located in other units?
10. Are there any specific services in other units that should be done or located in your unit?
11. Are there any practices, procedures, policies or organizational structures in the University that you think the Working Group should review.

25. During cross-examination, Mr. Watt conceded that all of these events took place in a context where members of the applicant's bargaining unit had concerns that the review process was part of a larger restructuring exercise that might lead to a loss of positions within the bargaining unit. Mr. Watt also candidly acknowledged that there was a legitimate basis for these concerns as fundamental restructuring on a "macro" level could result in job dislocation and redundancies. Finally, Mr. Watt observed that the respondent was facing severe funding pressures. These pressures could lead to reduced enrolment levels which in turn could result in further restructuring and loss of funding.

26. Mr. Ian Babcock testified on behalf of the applicant. Mr. Babcock is an Administration Officer in the Department of Biology and a member of the applicant's executive. Mr. Babcock was one of the employees to have received the questionnaire. He explained that the questionnaire had been sent directly to him for reply over the signature of Mr. Van Loon. He understood that he could not decline to answer it and that the request was in the nature of a work assignment rather than being voluntary.

27. Mr. Babcock filled in the questionnaire and returned it. Although he understood that he was being directed to complete the questionnaire, he did not feel obliged to provide responsive answers to those questions which he felt touched upon collective bargaining matters. For example, his answers to questions 7, 8, 9 and 10 are as follows:

RESPONSE TO QUESTION NO. 7:

I am not aware of any such hindrances.

RESPONSE TO QUESTION NO. 8:

This is a management matter and as such should be referred to union exempt personnel for discussion with the bargaining agent.

RESPONSE TO QUESTION NO. 9:

This is a management matter and as such should be referred to union exempt personnel for discussion with the bargaining agent.

RESPONSE TO QUESTION NO. 10:

None.

III

Positions of the Parties

28. The applicant argues that the respondent's conduct is in breach of both sections 70 and 73(1) of the Act:

70. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

73. (1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

29. The applicant's theory concerning the breach of section 70 is that the respondent's conduct precluded it from exercising an appropriate representational role. It was also argued that the way in which this was done, sent a message to bargaining unit members that their bargaining agent was being denied a role in a process which not only addressed collective bargaining issues, but would have significant consequences for job security. To this extent, according to the applicant, the respondent undermined its efficacy in the eyes of its members. This in turn has eroded its ability to properly represent its membership.

30. With respect to the breach of section 73(1), the applicant asserts that the respondent, through the device of a questionnaire, began a discussion with employees concerning issues that are properly the subject of collective bargaining. According to the applicant, this directly breached the provisions of section 73(1), and undermines the applicant's ability to deal with these issues later, should they be addressed through formal bargaining.

31. The respondent's theory is that it was appropriately conducting a legitimate enquiry amongst its employees for purposes of making important long term decisions around restructuring. In the respondent's view, it was acting responsibly by making sure that the information collected by the process truly reflected the views of the people who would be most affected by its outcome - its employees.

The Issues

32. There are two discrete issues raised in this case, one narrow and one broad. The narrow issue is whether the respondent "bargained" with employees directly. The broader issue is whether the respondent "interfered" with the applicant's representation of employees, irrespective of whether it "bargained" with them.

33. Most Canadian jurisprudence recognizes a close relationship between the notions of direct bargaining and interference. Very often these categories are collapsed. It will almost always be the case that where an employer bargains with employees it will also have interfered with representation rights. It is possible to interfere with representation rights in ways which do not involve direct bargaining.

34. In this case, we ruled orally that there was no direct bargaining, but that there was interference with bargaining rights. To explain this result, we will deal with the two issues separately, beginning with the narrower issue of direct bargaining.

Direct Bargaining-Section 73(1)

35. Section 73(1) precludes an employer or anyone acting on their behalf from bargaining directly with employees. It is self-evident that this restriction on employer conduct is essential to preserve a union's role as exclusive bargaining agent. The restriction does not obviously preclude discussions between employer and employee concerning the workplace. An employer *must* be able to obtain information on a continuing basis from employees about the workplace, how it has, and will in the future, function.

36. In the past, it has been more common for issues of direct bargaining to be raised in circumstances where employers have purported to exercise their freedom to express their views about collective bargaining. In these cases, the issue is whether the employer has crossed the line between its freedom of expression (provided for in section 70 of the Act) and the prohibition on direct bargaining. The Board described this issue in *A.N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393 at paragraph 18:

"The existence of this well established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not "deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence". Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from

illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be characterized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.

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37. There are also cases where employers have attempted to agree on special terms of employment with particular employees in specific situations (for example extensions of leaves of absence, severance packages or pay above a rate established in a collective agreement).

38. The circumstances of this case do not fall within these two traditional categories and to that extent are unusual. They do reflect as I have noted earlier, a particular trend in both private and public sectors where, entire industries are being rapidly but fundamentally restructured.

39. In this case, the respondent was faced with a pressing need to change its methods of operation. To accomplish this, it put in place a system for collecting reliable information about its current ways of doing things. Clearly, this was a sensible starting point. Any rational method designed to improve work processes must be based on an accurate and reliable "snapshot" of the work. The respondent decided that the best source of this information was its employees. This decision also seems reasonable. No one understands the practical ins and outs of the work process as it exists better than the people who perform the work.

40. Having determined where it would seek information, the respondent decided to collect it from employees in three ways, none of them unconventional. Of the three methods used, the applicant's concerns focused on only one - the questionnaire. More specifically, there were two concerns about the questionnaire. Firstly, that there were four questions which dealt directly with collective bargaining issues. Secondly, that employees understood they had no choice but to answer the questions.

41. The applicant's concern was not that employees were being given an opportunity generally to speak to the employer about collective bargaining matters. There is nothing which precludes an individual employee from discussing these types of issue directly with an employer *if they choose to do so*. It is quite another thing however for the employer to formally require such a discussion.

42. Formalized methods of communication between employer and employee in a unionized workplace will be appropriate or not to some extent, depending on the issues being discussed. It may for example be a breach of section 73(1) to require a response to a questionnaire which dealt directly with a collective bargaining issue, particularly if the parties are in the process of bargaining. It may alternatively be appropriate for an employer to ask employees generally "could anything be done differently?", or to have a "suggestion box" or an "new ideas" incentive program.

43. Here, there are three aspects of the process which assist in determining the issue. Firstly, there is the degree to which employees were *required* to address collective bargaining issues. The uncontradicted evidence on this point was from Mr. Babcock. He explained that he understood that he was being directed to complete and return the questionnaire. His participation was an "assignment" and not optional. Despite this direction he felt free to provide answers on particular questions which were unresponsive. He did this with questions that in his view, touched upon collective bargaining matters. I conclude from this and other evidence that employees understood that they were permitted to take the position on the questionnaire that some questions did not really have to be answered. Certainly, this

was due in part to the advice of their bargaining agent. At the same time, the respondent did nothing to indicate that employees could not follow this advice. There were no explicit directions to employees which suggested the type of detail required in a response.

44. Secondly, there is the extent to which the four questions in issue necessarily focused on collective bargaining matters. It cannot be said that the questions in issue would *require* such answers. Certainly, answers could be given which would deal with collective bargaining matters, but not necessarily. Even the most directed questions such as questions 9 or 10 could be answered in ways that would not raise collective bargaining issues. The questions provided an opportunity for employees to comment on these types of issues, but not an obligation.

45. Thirdly, this was not a situation where an employer was putting forward a particular position for employees to respond to. The respondent was not asking for example, whether employees would prefer a particular form of scheduling, work assignment or system for dealing with job postings. To some extent, the term “bargaining” implies a putting forward of a suggestion to which the other side responds. There were no suggestions put forward here.

46. In circumstances where an employer questionnaire does not in fact require particular answers that must be directed to collective bargaining issues, and where no particular proposals are being put forward, it cannot be said that this is an attempt to bargain directly with employees. In my view, employers may increasingly and with justification look to their employees for reliable information about current work processes. This is permissible if it is done in a general way that does not necessarily target collective bargaining issues *and* permits employees to decline to respond if they feel that issues are more appropriately taken up with their bargaining agent. For these reasons the application with respect to section 73(1) was dismissed.

Interference-Section 70

47. Section 70 of the Act precludes an employer from conduct which will have the effect of interfering with a union’s ability to administer itself or to act as exclusive bargaining agent. This type of provision is common in most Canadian jurisdictions (see section 94(1)(a) of the *Canada Labour Code* for example). In *Canadian Labour Law*, former Board Chair George Adams comments:

The general nature of this section blankets not only other more particular proscriptions against interference with employees’ rights to join a trade union free from intimidation, coercion, discrimination, threat of dismissal or other penalty for union membership but also other discriminatory employer activity which is not captured by the more specifically worded interdictions. As noted in the previous section, of particular importance is the absence of wording requiring an “intent” to interfere. Therefore, an employer’s violation of one of the more specific sections requiring animus almost invariably contravenes a s. 70-type provision but a violation of the latter arrived at by a non-motive analysis may not be a breach of the former. Complementary to the statutory provision against employer interference in trade union activity are other sections such as the bar against certification or the mandatory refusal to consider certain agreements as collective agreements if the employer has participated in the formation or administration of a trade union or has contributed financial or other support to it. Obviously, the censure of employer interference in trade union activity is one of the most useful and important provisions in Canadian labour statutes.

48. The scope of what is now section 70 of the Act was discussed in some detail by the Board in *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316.

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27. What becomes immediately apparent is the use in sections 66 and 70 of words suggesting a motive requirement whereas section 64 is expressed more in terms of effect. More specifically, section 66 uses the words “because”, “seeks” and section 70 the word “seek”. These words are not

to be found in section 64. Instead, section 64 refers to interference. That section is also a very general one cast in terms, *inter alia*, of interference with the formation, selection or administration of a trade union. On the other hand, sections 66 and 70 are more particular in scope, aimed at particular kinds of improper action which impede or prevent persons from exercising rights under the Act. The result is that any conduct that violates sections 66 and 70 arguably will also offend section 64 but the opposite will not necessarily be so. For this reason, the inter-relationship and scope of these sections (principally sections 64 and 66) are absolutely critical. If section 64 does not require an "intent" to interfere and sections 66 and 70 do, complainants would be better off filing complaints only pursuant to section 64. The result would be, however, to read sections 66 and 70 out of the Act. This would be a dubious application of legislative intent. On the other hand, interpreting section 64 always to require motive gives little or no effect to the difference in language between the sections. ...

49. In *International Wallcoverings, supra*, the Board acknowledged the utility of having an unfair labour practice provision for which motive was irrelevant. At the same time the Board observed that all legitimate employer conduct which may "interfere" with a bargaining agent should not necessarily amount to an unfair labour practice. For example, where an employer dismisses an inside organizer and the Board finds that the dismissal is not tainted by an anti-union animus, it may very well be that the union's organizing efforts have been interfered with despite the fact that the dismissal is appropriate in the circumstances. These facts should not in every case amount to an unfair labour practice. If they did, then there would be no need for sections 72 and 76 of the Act.

50. The Board in that case, fashioned a test which attempted to balance these competing principles. The test requires a balancing as between the "business purposes" behind the employer's conduct and the union's "protected activity" which may have been interfered with. In paragraph 32 of that decision, the Board described the type of employer conduct which would breach section 70:

...cases arise where employer conduct has a significant impact on protected activity and, while supported by good faith, does not reflect a persuasive or worthy business purpose...

51. There are no decisions of the Board which have applied this test to fact situations comparable to the one here. By this I mean particularly, situations where employers directly solicit information concerning work processes from employees as part of a broad restructuring exercise. The parties referred by analogy to the following decisions of the Canada and the Alberta Labour Relations Boards: *Canadian Broadcasting Corp. and C.U.P.E. Broadcasting Division* (1994) 27 C.L.R.B.R. (2d) 110; *Staff Nurses Association of Alberta and University Hospitals Board*, (1995) Alberta Labour Relations Board decision File No. GE-01662 (unreported). In both these cases, employers had begun restructuring exercises. The issue in dispute was whether a protocol designed to obtain information directly from employees concerning work processes amounted to interference with the union.

52. In *University Hospitals*, the respondent hospital commenced a project to redesign its patient care model. As in this case, the employer's initiative was driven in part by funding pressures. The stated goals of the redesign process there were similar to the ones here.

53. To begin its restructuring, the employer in that case initiated what it termed a "design phase". Part of the design phase included the creation of committees and teams consisting of a mix of management and bargaining unit employees. Through these teams and committees, there would be direct employee consultation to deal with various substantive issues.

54. At the outset of the design phase, the employer formally invited union participation in the process. The employer indicated that union involvement in "any level of the process is a possibility". The employer also committed itself to "parallel discussions" with the union dealing with any matters that were properly the subject of collective bargaining. In response, the union permitted its members to participate in the process but cautioned them to refer collective bargaining matters to it.

55. After the process was underway, the union at a certain point took the position that the employer was failing to bring collective bargaining issues arising out of employee consultations, to the parallel discussions. In response, the employer wished to continue to use the parallel discussions to deal with this new concern. The union did not agree and filed the unfair labour practice complaint.

56. In dismissing the union's application, the Alberta Board focused on three points. Firstly, that the issues being discussed in the "design phase" were quite preliminary to any real structural changes. Secondly, the employer had made a point of reminding all involved that the discussions were preliminary *and* where collective bargaining issues arose, they would certainly be raised with the bargaining agent. Thirdly, while the employer had attempted to involve the union quite broadly from the outset of the process, the union withdrew at a certain point, past which the employer tried to carry on as best it could to keep the union advised as to the progress of the review. On this last point, the Alberta Board noted at page 13 of the decision:

... There is no evidence the UAH was attempting to preclude SNAA from the Design Project. In fact, UAH attempted to involve SNAA, and other unions, in whatever ways SNAA chose to be involved. ...

57. In *CBC*, the employer decided to embark on a major restructuring exercise. As in the case before us, part of the reason for this was reduced levels of funding. The process started with the employer advising the union of its plans. The employer did not invite the union to participate to any degree in deciding how the process would be structured. The process established by the employer involved direct discussions with employees about issues that could touch upon collective bargaining matters. It was acknowledged that some of the possible suggestions which might result from these discussions could lead to proposals to amend the collective agreement between the parties. Following the initial presentation of the plan, the union raised concerns with the employer concerning its lack of participation in the process. The employer responded by assuring the union that it would be consulted at the end of the information gathering stage. Despite the union's expressed concerns, the employer proceeded with its planned process. In response, the union filed an unfair labour practice complaint.

58. In allowing the complaint, the Canada Board acknowledged that the type of planning and restructuring exercise that the employer was engaging in was becoming increasingly necessary in the current social and economic climate. Where the employer went wrong however was in failing to provide an opportunity for union involvement in the process. To this extent it was concluded that the employer's conduct had undermined the union's ability to represent its membership. This amounted to an act of interference contrary to the statutory provision comparable to section 70 of the Act (section 94 of the *Canada Labour Code*). The Canada Board noted at page 121:

Greater consultation and interaction between management and labour on workplace issues is not only desirable but, in the current social and economic milieu, becoming increasingly necessary. In order for labour and management to develop the constructive labour relations and collective bargaining practices which Parliament intended to support and foster by promulgating the *Canada Labour Code*, parties, such as the union and employer at CBC faced with the demanding circumstances that presently exist, must adopt progressive and realistic industrial relations strategies — strategies that both acknowledge and the existing economic and competitive realities, as well as appreciate the necessary mutual interdependence of the union and employer in promoting and achieving the common well-being of both the employer's operation and the employees' working conditions to "ensure", in the words of Parliament, "a just share of the fruits of progress to all" (preamble of the Code).

In the prevailing circumstances at the CBC, it is understandable why the employer sought to establish a process that would facilitate the kind of broad-based employee involvement it hoped to achieve. However, in a union environment, the employer cannot institute an employee participation program — such as OFC was — which focuses on areas that are directly the concern of the union in the collective agreement, or on the bargaining table, without involving the union itself in the

establishment and conduct of the process. To be successful, any consultative program to be implemented by the employer in a unionized workplace must involve the union in a meaningful way. To ensure that the consultative process established does not offend the provisions of the Code, the employer must ensure that its implementation does not serve to subvert, circumvent or replace the union in its legitimate role as exclusive bargaining agent, or, in the words of s. 94, otherwise interfere with the administration of the trade union or its representation of the employees.

59. Despite the differing results in these two cases, both acknowledge that an employer may legitimately seek information directly from employees as part of a restructuring exercise. There is also a recognition that unions are entitled to play a role in these types of planning processes. Both decisions attempt to determine whether the employer could get what it needed in a way that provided a role for the bargaining agent. While described differently, this analysis is comparable to the balancing of “protected activity” with “business purpose” in *International Wallcoverings*.

60. How were the competing interests of the parties balanced in this case? Firstly, there is the applicant’s role in the process. The applicant was not provided with an opportunity to participate at any stage. The terms of reference were drafted and presented to the applicant as an accomplished fact. When it raised concerns about the process, the respondent provided no assurances that these would be considered or that decisions made which concerned the applicant would be reconsidered. Although the applicant was sent a copy of the draft call for proposals, it indicated to the respondent that it needed more than two days to respond. The respondent proceeded in any event. Finally, when the applicant asked to be able to attend an information session where its members would be in attendance, its request was pointedly denied.

61. The next area to consider is the subject matter of the questionnaire. While employees were probably not compelled to provide responsive answers to the questions of concern to the applicant, there is no doubt that the scope of those questions raised real concerns amongst bargaining unit members as to whether the respondent was asking for information which should come from the bargaining agent. It is also the case that the respondent was aware of this concern both from its initial meeting with the applicant and its meetings with those employees who had received the questionnaires.

62. What were the respondent’s reasons for having excluded the applicant from the planning process? Mr. Watt explained that when the terms of reference were being drafted, no thought was given to union participation. No reasons were given for having denied the applicant’s request to participate in the information sessions.

63. Finally, there is the broader context in which these events took place. Everyone in the university community seemed to know that one of the outcomes of the restructuring process was that jobs could be lost. This was understood notwithstanding assurances that the restructuring would take place initially on a very senior “macro” level. There were also the discussions leading to and the settlement of the earlier unfair labour practice complaint. The parties must be assumed to have understood that the issue of the applicant’s role in a restructuring exercise was on the table. It had already been flagged for the respondent by the earlier application which was settled while the terms of reference for WGAR were being drafted.

64. In the circumstances, I find that the applicant’s ability to represent its membership was interfered with and that this was done in the absence of any “persuasive or worthy” employer purpose, to use the words of *International Wallcoverings* (supra). The respondent should have permitted the applicant to play some role in the restructuring process. Accordingly, the respondent is found to be in breach of section 70 of the Act.

65. The applicant seeks by way of remedy a declaration and posting. Both are appropriate. The respondent is directed to post a copy of the "Notice" attached to this decision in a conspicuous place for a period of 60 days following the date of this decision.

Appendix "A"

The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

CARLETON UNIVERSITY HAS POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH THE UNION AND THE COMPANY HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD HAS DETERMINED THAT CARLETON UNIVERSITY VIOLATED SECTION 70 OF THE ONTARIO LABOUR RELATIONS ACT, 1995, AS A RESULT, THE BOARD HAS ORDERED US TO INFORM YOU OF YOUR RIGHTS:

THE LABOUR RELATIONS ACT, 1995 GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES;

TO FORM, JOIN AND PARTICIPATE IN THE
LAWFUL ACTIVITIES OF A TRADE UNION;

TO ACT TOGETHER FOR COLLECTIVE
BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE
THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT IN ANY OTHER MANNER INTERFERE
WITH OUR EMPLOYEES OR THEIR TRADE UNION IN
THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE
ONTARIO LABOUR RELATIONS BOARD.

CARLETON UNIVERSITY

PER _____
(AUTHORIZED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive days

DATED this 29th day of January, 1998.

3244-97-R Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880, Applicant v. Corporation of the Town of Tecumseh, Responding Party

Certification - Employee - Union applying to represent bargaining unit of “volunteer” fire fighters employed by municipality - Board finding “volunteer” firefighters to be employees within meaning of Labour Relations Act

BEFORE: *Mary Ellen Cummings*, Vice-Chair.

DECISION OF THE BOARD; January 21, 1998

1. This is an application for certification. The applicant seeks to be certified for a bargaining unit consisting of volunteer fire fighters. Another panel of the Board ordered a representation vote. The applicant was successful in the vote. However, the responding party, the Municipality of Tecumseh (“Tecumseh”) has maintained throughout the proceedings that the bargaining unit is inappropriate because the volunteer fire fighters are not “employees” within the meaning of section 7 of the *Labour Relations Act, 1995*. Tecumseh argues that as a result, the applicant is not entitled to a certificate.

2. In the event the Board rejects Tecumseh’s arguments, there is a further outstanding issue. Tecumseh argues that the Deputy Fire Chief exercises managerial functions, and therefore, should be excluded from the bargaining unit, in accordance with section 1(3)(b) of the Act. The applicant disagrees. The parties have agreed to defer the issue for the present, and in the event it becomes relevant, they will seek to come to an agreement, and failing agreement, will bring the matter back to the Board. The Board remains seized of the issue of the status of the Deputy Chief.

3. The parties agreed to an expeditious method of putting forward their evidence. The Board heard from one witness, Fire Chief Randy Cecile.

4. Tecumseh is a town on the southern side of the city of Windsor, in the County of Essex. It is chiefly a bedroom community, with little industry. Fire protection services for Tecumseh are provided exclusively by a volunteer fire department. Such departments are called “volunteer” both colloquially and in legislation to differentiate them from fire departments staffed by full-time fire fighters. In fact, volunteer fire fighters receive some remuneration for the work they perform.

5. In Tecumseh, Chief Cecile is the only full-time member of the Town of Tecumseh Fire Department (the Fire Department), and is agreed to be an employee of Tecumseh. He reports to Town Council, and by way of a municipal by-law which establishes and regulates the Fire Department, “...is responsible to council for the proper administration and operation of the department, for the discipline of its members...” Chief Cecile oversees the Department, attends major alarm incidents, and performs fire inspections.

6. Volunteer fire fighters are recruited by way of advertising in local papers. Chief Cecile said that the ads typically attract 40 candidates. They respond either by résumé, or fill out application forms that Tecumseh uses for regular employment opportunities. Chief Cecile reviews the expressions of interest, focusing on such factors as whether the candidate has First Aid, CPR or other relevant skills, and the candidate’s availability. Chief Cecile said that all the volunteer fire fighters have full-time jobs, many with the car manufacturers in the Windsor area. Chief Cecile seeks to maintain a roster of fire fighters who are available at different times in the day. He said that it is difficult to recruit fire fighters who would be available to answer an alarm during the day, so he would be interested in a candidate whose full-time employment was steady nights.

7. Chief Cecile selects 10 candidates to take an aptitude test, then the highest four or five scorers are selected for interview by the Council's Fire Committee, consisting of the Mayor, a Town Councillor, the Chief and the Deputy Chief. The Fire Committee makes its selection, then recommends to Council that the selected candidates be appointed as volunteer fire fighters. Council has always accepted the recommendation.

8. The 23 volunteer fire fighters are paid an honorarium of around \$900 a year (Captains receive around \$1,500 and the Deputy Chief around \$2,350). The honorarium is paid annually, and without regard to the amount of fire fighting each member performs.

9. Training is provided twice a month, in two hour sessions offered in the morning and the evening. The sessions cover such issues as First Aid, fire suppression techniques, hydraulics, use of ladders, chemical spills, ventilation, and use of self-contained breathing apparatus. The lesson plans are based on training modules provided by the Ontario Fire Marshal's Office. Each lesson is accompanied by a written and practical test which Chief Cecile said that the fire fighters complete. The Fire Marshal's Office training program integrates a certification process, but Chief Cecile said that there is no obligation on members of the Fire Department to get the certificate. Chief Cecile said that he has no means to force the fire fighters to attend the training, although, in fact, people attend when they are available. He said that if someone did not attend for four to six weeks he would ask the person for an explanation, and regular non-attendance might result in a recommendation that he be removed as a fire fighter. To date, this has not occurred. Fire fighters who attend the training are paid \$25.00 per session.

10. The Fire Department also expects fire fighters to attend two evenings a month to perform maintenance on the fire hall, vehicles and hose. Chief Cecile said it is important to keep the equipment in good repair. Fire fighters who attend are paid \$25.00 a session.

11. Some fire fighters provide public education, particularly during Fire Prevention month, at the request of the Chief. Participation is voluntary, and the fire fighters are paid \$14.00 an hour for this work.

12. The fire fighters are not scheduled to respond to alarms. Instead, all fire fighters have been issued with pagers. The Windsor Fire Department provides dispatch services for Tecumseh. The Fire Department provides fire protection to Tecumseh, and to St. Clair Beach. In addition, it participates in an "automatic aid agreement", providing supplemental response for neighbouring municipalities. When a call is received to which the Tecumseh Fire Department must respond, Windsor dispatch activates the beepers the Tecumseh fire fighters have, and whoever is available responds. Chief Cecile said he has no control over who responds and is never sure who will show up. Further, Chief Cecile said that he cannot require a fire fighter to answer a call. Fire fighters attend at the station, get in the trucks, and leave for the incident (fire, vehicle accident, First Aid call etc.). Fire fighters are paid \$20.00 an hour for time spent responding to a call.

13. At the accident scene or fire ground, the most senior ranking fire fighter directs the activities. If the Chief attends, he directs the scene, through the Deputy Chief, who directs through the Captains. There is no formal platoon or crew system, because who will attend an incident is unknown. However, although the system is informal to that extent, the orderly "chain of command" is followed, with fire fighters taking their directions from Captains, who take their directions from the Deputy Chief etc. If neither the Chief nor Deputy Chief attend at the alarm, the most senior Captain is in charge of the scene.

14. In 1996, the Tecumseh Fire Department responded to 120 calls, and in 1997 to 167 calls. Chief Cecile said that the increase is due to the automatic aid agreement that takes the Fire Department into neighbouring municipalities.

15. The fire fighters are paid differently than Tecumseh employees. The honorarium is paid annually, and the payment for training and fire fighting activities is paid quarterly. No income tax is deducted, and Employment Insurance premiums are not paid, although fire fighters paid over a certain amount have had Canada Pension Plan premiums paid. Fire fighters do not receive a standard benefit package (with the exception of the Chief). However, Tecumseh provides a \$10,000 life insurance policy (escalated to \$50,000 if the fire fighter dies in the course of duty) and has agreed to reimburse the costs of dental, vision and hearing aid damage incurred in the line of duty. In addition, Tecumseh has agreed that when a fire fighter is injured in the course of duty and unable to work at his regular employment as a result, Tecumseh will top up any Workers' Compensation or Canada Pension disability payments to equal 70% of the fire fighter's regular salary.

16. Chief Cecile acknowledged that he is accountable to Council for the efficient and effective operation of the Fire Department. He has the power to suspend fire fighters from service, and has done so recently. Chief Cecile testified that two fire fighters were suspended from duty for a month. He said they talked directly to the media without his knowledge, thereby breaching Fire Department policy, and the chain of command. He also has the power to recommend that a fire fighter be released, but has never done so. Ongoing informal evaluation of fire fighters' performance is provided as part of the training program, particularly for fire fighters in their first year. The roster of fire fighters is stable, with no changes in personnel in 1996 and 1997. Chief Cecile said that people enjoy serving as volunteer fire fighters, and are often surprised when they apply to find that they will be compensated.

17. Counsel for Tecumseh submitted that Tecumseh and the fire fighters never intended to create a relationship of employment, nor have they in fact done so. He characterized the fire fighters as volunteers providing a valuable community service, in the capacity of civic-minded citizens. He noted that all have full-time jobs elsewhere, and could not live on the amounts earned as fire fighters, which ranged from \$2,800 to \$4,900 per year. In fact, he argued, the parties have acknowledged that fire fighters' real employment relationship is elsewhere by agreeing that Tecumseh will protect fire fighters' regular salaries if they are injured while on duty.

18. Mr. Milloy commented that fire fighters were paid differently from other Tecumseh workers, and did not enjoy a benefits plan in the manner of Tecumseh employees.

19. He also argued that Tecumseh exercises little control over the fire fighters. It cannot compel them to attend training or maintenance sessions, nor can it force them to attend alarms. He emphasized that Tecumseh does not schedule the fire fighters or otherwise control their attendance.

20. Counsel for the applicant argues that there were many indicia of an employment relationship. He noted that the relationship was not unlike that in other casual employment situations. While the wages are not full-time wages, they are not insignificant for part-time work, and the monies paid, apart from the honorarium are related to the amount of work performed.

21. Mr. Dale emphasized that the fire fighters provide all of Tecumseh's fire protection services. This is an important function of the Town. Mr. Dale also emphasized that Chief Cecile provides significant direction and control, both in the recruiting and operation of the Fire Department, that made the relationship look like that of employment.

22. I will start the analysis with the statutory framework. The *Fire Protection and Prevention Act, 1997* defines a "volunteer fire fighter" as "...a fire fighter who provides fire protection services either voluntarily or for a nominal consideration, honorarium, training or activity allowance." The *Fire Protection and Prevention Act, 1997* governs the labour relations of salaried fire fighters in Part IX.

and explicitly excludes volunteer fire fighters from its purview. In a parallel provision, section 3 of the *Labour Relations Act, 1995* (as amended) provides that it does not apply to a fire fighter whose labour relations are governed by Part IX of the *Fire Protection and Prevention Act, 1997*. As Mr. Milloy correctly pointed out, this statutory scheme is significant for two reasons. First, it highlights that a “volunteer fire fighter” includes one who receives some remuneration, and second, and more important, envisions that fire fighters other than salaried fire fighters are entitled to inclusion in the *Labour Relations Act, 1995*. In other words, the issue before the Board is not whether *any* volunteer fire fighter can be an employee, but whether the volunteer fire fighters in Tecumseh are employees, for the purposes of the *Labour Relations Act, 1995*.

23. Over the years, the Board has determined in a number of cases that employment relationships may take on a variety of appearances. For example, in *Calvano Lumber & Trim Co. Ltd.* [1989] April 337:

Employment relationships may exhibit a variety of forms in different contexts, but *the essence of such relationships is the exchange of labour for consideration in some form*. Collective bargaining concerns the terms of that exchange and trade union representation permits even small groups of employees to improve them. It does not matter that an individual may not be “employed” or “paid” in a conventional way, nor does it matter that the alleged employee only works sporadically or shows up on the employer’s doorstep and is engaged on a casual basis.

[emphasis added]

24. There is no doubt that the relationship between the volunteer fire fighters and Tecumseh is unusual in some respects. The most unusual aspect, and the one emphasized by Mr. Milloy, is the lack of scheduling of work, and the Chief’s inability to determine if and when fire fighters will answer a call, or participate in training and maintenance. But is that factor enough to make the fire fighters volunteers rather than employees. I have concluded that the answer is no.

25. The relationship between Tecumseh and the fire fighters has many hallmarks of a more traditional employment relationship. There is an exchange of labour for consideration, which the Board described as “the essence” of the employment relationship. And part of the consideration is directly related to the amount of work performed. Further, the consideration is more than token, particularly when the value of the benefits is considered. I have no doubt that the volunteer fire fighters’ participate in part because of a desire to make a useful contribution to their community, but that does not detract from the fact that there is a commercial element to the relationship.

26. Every other aspect of the relationship resembles a typical employment situation. Fire fighters are recruited through a formal process, which assesses skills, aptitude and availability. They are officially appointed by Town Council. Formal training is provided on an ongoing basis with testing of competence. The Board understands that no one has ever been terminated for failure to attend the training, but Chief Cecile said that regular absences would be a cause for concern and action.

27. Chief Cecile has the power to discipline, and recently suspended two fire fighters. That power is a classic element of an employment relationship. Similarly, fire fighters are directed in their work on the fire ground or accident scene in a hierarchical manner, that again, is typical of an employment relationship.

28. When the factors typical of an employment relationship (pay and benefits; manner of recruitment; discipline and direction) are balanced against the single dissonant factor of the voluntariness of participation in a given call, the Board concludes that the relationship looks more like an employment relationship than one of volunteer.

29. There are two other considerations that influence my decision. First, in deciding whether the fire fighters are employees, the alternative is not another kind of commercial relationship (such as independent contractor) but "volunteer". I am reluctant to find that the fire fighters are volunteers when so many aspects of the relationship with Tecumseh have a business-like quality to them. To cite but one example, a suspension from duty for an alleged infringement of policy and breach of the chain of command would be inconsistent if the fire fighters were true volunteers.

30. Second, I have considered that the fire fighters provide the whole of the fire protection service for Tecumseh and St. Clair Beach. All would agree that fire protection is an essential municipal service. In this day and age, it seems improbable that those who provide a vital service on behalf of a municipality do not have some sort of commercial relationship with the municipality.

31. For all these reasons, I have concluded that the volunteer fire fighters in the Tecumseh Fire Department are employees. Therefore, the applicant is entitled to certification as bargaining agent for the unit of volunteer fire fighters. This matter is adjourned and the Board will remain seized to deal with the status of the Deputy Fire Chief.

0080-97-OH Steven Karikas, Applicant v. Honeywell Limited /Honeywell Ltee., Responding Party v. National, Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 80, Intervenor

Discharge - Duty of Fair Representation - Health and Safety - Remedies - Applicant alleging that employer committed a number of reprisals against him for having exercised rights under Occupational Health and Safety Act - Subject matter of application to Board the same as subject matter of three grievances filed by Applicant under collective agreement - Union not referring grievances to arbitration - Applicant earlier filing complaint with Board alleging that union's failure to advance grievances to arbitration violating duty of fair representation - Earlier complaint asking Board to order union to refer grievances to arbitration - Board dismissing health and safety complaint on basis that Applicant, by filing duty of fair representation complaint and by seeking the particular remedy sought, had elected under section 50(2) of the Act to proceed by way of arbitration

BEFORE: *Kevin Whitaker*, Vice-Chair.

DECISION OF THE BOARD; January 22, 1998

I

1. This is an application pursuant to section 50(2) of the *Occupational Health and Safety Act* (the "OHSA"). By oral decision dated July 3, 1997 and reproduced in a written decision of the Board dated July 11, 1997, this application was dismissed. The application was dismissed on the basis that the applicant has elected under section 50(2) of the OHSA to proceed with this matter by way of arbitration rather than before the Board. What follows are the reasons for the dismissal.

II

2. The applicant was employed as a Fourth Class Operating Engineer with the respondent from October 28, 1976 to June 28, 1996. Generally speaking, the applicant's job was to be responsible for the power house mechanical rooms and related equipment. He was employed at the respondent's plant

at 740 Ellesmere Road. The applicant's bargaining agent was the National, Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 80 ("CAW").

3. In early 1988, the applicant suffered a compensable back injury. He received benefits and treatment from the Workers' Compensation Board from February 1988 for a period of approximately six months.

4. Between the time of his back injury and the summer of 1996, the applicant was provided at various times with light duties in an effort to accommodate his disability. During this period on a number of occasions, the applicant sought to protect himself by bringing to the respondent's attention, particular work assignments that he was not able to perform, or restrictions that were placed on his ability to work as a result of his disability. The applicant claims that in bringing these matters to the attention of the respondent, he was exercising rights under the OHSA.

5. The applicant alleges that the respondent committed a number of reprisals against him for having exercised his rights under the OHSA.

6. In April 1996, the respondent decided to relocate its operations from Ellesmere Road to 35 Dynamic Drive. The hot water heating system and the compressed air systems at the new location did not require the services of operating engineers. As a result, all operating engineers employed by the respondent including the applicant were provided with written notice that their positions would become redundant. The applicant was invited to accept a severance package or to elect to exercise his recall rights.

7. The applicant was interviewed unsuccessfully for a number of other jobs with the respondent and eventually accepted an offer of severance.

8. Following his written acceptance of the severance offer, the applicant took the position that he was not competent to agree to the offer at the time of acceptance. In the applicant's view, he had been unjustly dismissed. It was also his theory that the respondent had in dismissing him, committed a reprisal against him in contravention of section 50 of the OHSA.

9. The applicant sought the assistance of the CAW to file grievances on his behalf. Three grievances were filed on August 13, 1996. These grievances dealt with the respondent's alleged reprisal conduct prior to the applicant having accepted the severance package as well as the issue of his termination. In November of 1996, the CAW Grievance Committee met to hear from the applicant as to why his grievances should proceed. The Grievance Committee decided not to proceed with the applicant's three grievances.

10. Following the decision of the Grievance Committee, the applicant appealed the decision within the CAW's internal appeal procedures. It is not apparent whether the applicant received a final disposition of his appeal.

11. On January 13, 1997, the applicant filed an application with the Board pursuant to section 96 of the *Labour Relations Act, 1995* (the "Act") alleging that the CAW had breached its obligations pursuant to section 74 of the Act in failing to take his grievances to arbitration. The applicant in that matter seeks amongst other things, an order from the Board compelling the CAW to take his grievance forward to arbitration.

12. The parties are agreed that the subject matter of the applicant's three grievances are the same as the subject matter of this application. More specifically, that the respondent's treatment of the applicant amounts to an unjust dismissal, done as a reprisal against the applicant in addition to other

reprisal conduct, for having attempted to exercise his rights under the OHSA. At the hearing, the applicant took the position that the remedy being sought through the application under section 74 of the Act and the grievances filed with the intervenor as against the employer, was the same remedy sought in the application under section 50 of the OHSA.

III

13. The respondent raised two preliminary objections to the matter proceeding under section 50 of the OHSA, one of which was that the applicant had already elected under section 50(2) of the OHSA to proceed by way of arbitration and for that reason, the matter should be dismissed. As I have dismissed the matter on this basis, it is not necessary to deal with the other preliminary objection raised by the respondent.

14. The basis of the objection on this point is that the applicant wishes by his own admission, to pursue two avenues before the Board, both of which are designed to achieve the same purpose. One avenue is the application under section 50(2) of the OHSA. The other avenue is the application under section 74 of the Act and the underlying grievances. It is argued that in making the application under section 74 of the Act, the applicant is electing under section 50(2) of the OHSA to proceed by way of arbitration. This has the effect of precluding the application under section 50(2) of the OHSA before the Board.

15. The respondent relies on the Board's decision in *Reed Limited*, [1978] OLRB Rep. Jan. 1 which deals with applications under what is now section 50(2) of the OHSA.

16. In *Reed, supra*, the applicants had filed grievances with their union that had yet to be processed through the grievance procedure. The respondent employer argued on a preliminary basis that the applicants had already elected under what is now section 50(2) to proceed by way of arbitration and that the application before the Board should be dismissed.

17. The Board rejected the respondent's suggestion that an election to proceed by way of arbitration had been made. At paragraph 13, the Board in *Reed* distinguished between circumstances where a grievance was initiated but had yet to be processed through the grievance procedure, and circumstances where the grievance procedure had been exhausted and the applicant had "authorized" the union to proceed to arbitration:

• • •

13. To adopt the approach argued by the respondent would force an employee to forego the grievance procedure entirely in order to preserve the right of recourse to the statutory procedure. Such a development, in our view, would not be desirable from an industrial relations perspective. If there exists a grievance procedure, employees should be encouraged to utilize that process before pursuing the statutory procedure. The Board, therefore, should not foreclose an employee from bringing a complaint before it simply because that employee has had his union take the matter through the grievance procedure. Once it is established, however, that the employee has authorized the union to take the matter beyond the grievance procedure to arbitration, the Board will not deal with any complaint relating to that matter. Whether the employee has chosen arbitration prior to or following the actual filing of the complaint with the Board, the Board will treat the employee as having elected arbitration, and as being bound by that election.

• • •

18. In *Reed* the Board determined in essence that once the grievance procedure was exhausted and the grievor still at that point took the position that the matter should proceed to arbitration (rather than just be processed through the grievance procedure), as a question of fact, an election had occurred.

19. In the present case, once the intervenor union decided that the applicant's grievances should not proceed to arbitration, the applicant filed an application under section 74 of the Act. As part of that application, the applicant requested by way of remedy that the Board order the trade union to proceed to arbitration with the applicant's grievances. As of the date of the hearing in this matter, the applicant was still persisting in this request despite his own admission that the same remedies sought there were being pursued in the application under section 50(2) of the OHSA.

IV

20. In these circumstances, I find that the applicant has sought to compel the intervenor trade union to proceed with his grievances to arbitration. Once the application with respect to section 74 of the Act was made with the particular remedy sought, the applicant had committed himself to a course of action. As mentioned earlier, the applicant intended to proceed with the application under section 74 as of the date of hearing. In my view, the analysis in *Reed* applies here and I find that the grievor is in the same position with respect to his bargaining agent as if he had "authorized" it to proceed to arbitration following the grievance procedure. For these reasons, the application under section 50(2) of the OHSA was dismissed.

1132-95-G International Brotherhood of Electrical Workers, Local 105, Applicant v. Jaddco Anderson Limited, Responding Party v. General Presidents' Maintenance Committee for Canada, and The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Intervenors

Construction - Construction Industry Grievance - IBEW and employer disputing whether certain work was properly performed under terms of General Presidents' Maintenance Agreement or whether that work was construction work that should have been performed under ICI collective agreement - Disputed work associated with putting decommissioned blast furnace back in service - Board reviewing various aspects of disputed work including work associated with stockhouse, furnace charging, casthouse, stoves and hotblast system, gas cleaning, electrical and instrumentation - Board concluding that disputed work, when viewed in its entirety, properly considered "construction" work falling within ICI collective agreement

BEFORE: *Jules B. Bloch*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *Raj Anand*, *M. Kate Stephenson* and *John Grimshaw* for IBEW Local 105; *Roy C. Fillion*, *F. G. Hamilton* and *Daryn Jeffries* for Jaddco; *Chris Paliare* for General Presidents' Maintenance Committee; *Scott Thompson* for Electrical Contractors' Association of Ontario.

DECISION OF THE BOARD; February 18, 1998

1. This is an application brought pursuant to the provisions of section 133 the *Labour Relations Act, 1995*. The parties to this dispute agreed that they would conduct the hearing on the basis of a consultation-style brief. Underpinning this approach was an agreement entered into by the parties dated March 25, 1997 which is reproduced below:

March 25, 1997

The Applicant and Respondent agree that the Scope of Work (Tab 38) contains the work done by Jaddco at Dofasco Blast Furnace No. 3.

The Respondent asserts, and the Applicant disputes, that the items listed in Schedule "A" were not done, despite the fact that they appear in the Scope of Work.

The parties agree that they are not precluded from relying on other documents in support of their respective positions regarding the nature of the work done as per the scope of work.

"Raj Anand"
FOR GRIEVOR

"Illegible"
FOR RESPONDENT

Schedule "A"

The Respondent asserts that the following items contained in the scope of work were subsequently removed:

5.3.1
5.3.2
5.3.3
5.4.17
5.4.18
5.4.19
5.4.31)
5.4.32) and reference to same at Tab 38,
5.4.33) page 2 (item #18)
5.4.34
5.5.11
5.5.12
5.5.13
5.6.16
4.6.19
2.6.13

The work referred to in this memorandum is described below.

2. The applicant and responding party requested the Board to review the work performed on Dofasco Blast Furnace No. 3 in its totality and on that basis decide whether the totality of work should have been done pursuant to the ICI agreement. The intervenor Electrical Contractors Association of Ontario ("ECAO") took the position that we should review each item of work and make our decision on whether or not that specific piece of work should have been done under the ICI provincial agreement or pursuant to the General President's Maintenance Committee for Canada Project Agreement for Maintenance ("the General President's Maintenance Agreement").

3. The Board ruled that it would review the totality of the project and decide whether the work was properly performed pursuant to the General President's Maintenance Agreement.

4. A review of the General President's system can be found in *Delta Catalytic Industrial Services Limited*, [1996] OLRB Rep. March/April 233. We do not intend to review in this decision the role of the General President's Maintenance Committee or the decisions made under that collective agreement.

5. Our task here is straightforward. We are to review the scope of work referenced in the parties' agreement which the parties assert is the work done by Jaddco at Dofasco Blast Furnace No. 3. At the end of our review we are to decide whether the project in its totality was properly performed pursuant to the terms and conditions of the General President's Maintenance Agreement ("GPMA") or whether the work was construction work and consequently should have been done under the ICI collective agreement.

6. No. 3 blast furnace at Dofasco was shut down in 1994. The documents are replete with references that the furnace had come to the end of its campaign life. In our view it is not necessary to decide whether the furnace was at the end of its campaign life or simply was “mothballed” as a consequence of some other reason. The furnace was decommissioned in June 1994. Work was carried out at that time to quench the furnace and to make the furnace safe in its mothballed state.

7. A decision to bring the furnace back into service was made in September 1995. The documentation is clear and unequivocal that Dofasco and the various engineering firms it retained reviewed the furnace with an eye to putting it back on line. There were many different ways of putting this furnace back in service, involving many different levels and complexities of work. In the end Dofasco decided to use the scope of work found in the agreement of the parties (Tab 38), to put the furnace back on line.

8. The panel has reviewed the scope of work on the basis of dividing the furnace into its components and assessing what type of work has been performed in its totality.

9. The dichotomy between construction and maintenance has produced much jurisprudence. It is difficult for a contractor at the beginning of a job to assess what work is “construction” work and what work is “maintenance” work and consequently what collective agreement should be applied to any given project.

10. This panel has spent many months attempting to identify guidelines which would serve to help a contractor faced with the construction maintenance dichotomy. Unfortunately after reviewing all the material in great detail and in attempting to express general guidelines which would have helped contractors make proper decisions about maintenance/construction, we are unable to do so. In *Levert & Associates Contracting Inc.*, [1989] OLRB Rep. June 630, the Board said the following at paragraphs 12 to 15:

12. The Board has recognized a distinction between maintenance work and construction work since its decision in *Tops Marina Motor Hotel*, 64 CLLC ¶16,004, the first reported decision interpreting the definition of construction industry in what is now clause (f) of subsection 1(1) of the Act, even though the words maintenance or maintaining are not used in the definition or elsewhere in the Act. *The problem always is to make the distinction in a particular fact situation because there is no clear demarcation between maintenance work and construction and, in the Board's experience, what the parties see generally as being one or the other appears to be very much in the eye of the beholder. See, for example, Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481, at paragraphs 46 and 47. *The Board, of course, must determine whether or not work characterized by a party as maintenance work is construction work for purposes of the Act, not for some more general purpose. The Board's decision in Master Insulators', supra, is the first reported decision which lends some definition to the task of distinguishing maintenance work which is not construction work from repair work which is.*

13. The facts here are clear. The dissolving tank and the vapour pipe were functioning fully immediately prior to the shutdown. But, because they both had developed thin areas, it was decided, in the case of the tank, to reinforce those areas and, in the case of the pipe, to replace it because that was more economical than patching or cutting out and replacing the thin areas. The work was not an addition to the recovery and steam plant and was not for the purpose of increasing its production capacity. It was work done for the purpose of avoiding having the tank or pipe fail while the mill was operating. Clearly, it was work which would assist in preserving the functioning of the recovery and steam plant and it was not work done for the purpose of restoring a system which had ceased to function or function economically.

14. These facts distinguish this case from *Inscan, supra*, on which the applicant relies, where fire damage at a refinery stopped production for three weeks of a feedstock for lubricating oils. That process represented approximately ten per cent of the total product capacity of the refinery. The facts herein are much more analogous to those in *Gallant Painting, supra*, on which the respondent

relies. In that case the Board found that the painting of "...pipes, tanks and other containers...", amongst other things, in two petrochemical plants, was work which "...will preserve and protect the structures from corrosion and thereby extend their useful lives.". The patching of the tank and replacement of the vapour pipe served to extend the useful life of the recovery systems in the recovery and steam plant of the mill.

15. The fact that there were other contractors in the mill who may have been employing boilermakers pursuant to the boilermakers provincial agreement, an agreement which has application in the industrial, commercial and institutional sector of the construction industry, is of no assistance to the Board in this case. The question the Board must answer is whether the respondent was performing work in the construction industry and was an employer within the meaning of clause (c) of section 117 of the Act. That requires an analysis of the work which the respondent's employees were performing. There is no evidence that the work which they were doing had any connection whatsoever with the work being performed by the other contractors.

[emphasis added]

11. The Board in that case came to the conclusion that the dichotomy between construction and maintenance is based primarily on a factual context. It is an analysis of the factual underpinning of any given work which allows an adjudicator to decide whether the work is construction or maintenance. In certain situations replacements of components might lead to the conclusion that the work in that context is maintenance. However in another context the replacement of components when viewed in their totality might lead to a conclusion that the work is construction because when one replaces all the components he or she is in fact rebuilding the entire system or structure.

12. In the context of the facts before us we find that as a consequence of a reduced need for steel production, Dofasco decided to take one of its furnaces out of service. The decision to take blast furnace no. 3 out of production, rather than any of the other furnaces, was based on a myriad of factors which included the fact that blast furnace no. 3 was at or near the end of its campaign life and needed a lot of repairs.

13. The Board's decision in *Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477 is an often referred to case which attempts to explain the dichotomy between construction and maintenance. The following paragraphs are helpful in attempting to understand the theoretical framework that underpins the discussion about maintenance and construction:

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. The rest of the work referred to in the complaint was, for the most part, clearly *work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and is to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility.* However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 1341a(1) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with either their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "*maintenance*" is difficult to distinguish from "*repair*". In our view, it is a question of the context of any given work and the degree of addition

or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

[emphasis added]

14. At paragraph 16 of *National Elevator and Escalator Association*, [1991] OLRB Rep. April 555 the Board says the following:

16. As is evident from the *Master Insulators*, *supra*, case and the Board's subsequent jurisprudence, there is no clear distinction between construction and non-construction work. It is particularly difficult to draw a distinction between "repair" work, which is construction work, "maintenance" work, which is not (see, for example, *Lever & Associates Contracting Inc.*, *supra*, *Briecan Const. Limited*, [1989] OLRB Rep. May 417, *Inscan Contractors (Ontario) Inc.*, [1986] OLRB Rep. May 640, *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 41, *Quinard Limited*, [1982] OLRB Rep. July 1054). Whether something is repair or maintenance work will depend upon the nature and purpose of the work in question in the context of the facility of system in or to which the work is being performed. Generally, work performed on existing equipment in an existing facility for the purpose of keeping the facility or a system in it operating properly before the facility or system has ceased to do so, is appropriately characterized as maintenance work. On the other hand, work involving the addition to or replacement of equipment for the purpose of either increasing the capacity of the facility or system, or restoring the ability of a facility of system to function properly, is appropriately characterized as repair work. The amount, apparent significance, or value of the work in question may be part of the context in which the assessment is properly made but are in no way determinative of the question. Similarly, whether a facility or system is shut down while the work in question is being performed may also be relevant, but will not be determinative.

15. Jaddco asserts that there has been no production increase or efficiency increase as a consequence of the work performed on blast furnace no. 3, and absent those factors the Board should find that the work being performed on the system is maintenance work and properly performed pursuant to the General President's Agreement. Jaddco asserts that the replacements made to the furnace brought the furnace in line with modern technology. They assert that in the context of returning a furnace to service, replacing components with updated technology is not construction work.

16. The cases are clear that every fact situation needs to be analyzed by reviewing the context of the work. It may be that when one upgrades components in the context of a facility or system where the purpose is to keep the facility or system properly operating those types, of in-kind, replacements would lead to the conclusion that one is maintaining the facility or system and that the work in question is not construction work. The answer may be very different where the part of the system that is being worked on has been out of service and work is being performed to put the components of that system back into service and consequently the entire system back into service.

17. The following is our review by subject area of the scope of work found at Tab 38.

(a) Stockhouse

18. The work done on the stockhouse is found at Tab 38 between scope index no. 2.0 and 2.8.5. The stockhouse is where Dofasco stores raw material in preparation for the transport of the material to the blast furnace. We find that the stockhouse was in serious need of repair. The responding party asserts that in effect the stockhouse refit was done to update the facility. He asserts that when one makes changes to update a facility one is simply maintaining the facility. In our view while some updates may be directly related to maintaining a facility, the work done in the stockhouse was done to

bring the stockhouse up to a standard where it could be properly used for the purpose of storing raw material which would be transported to the blast furnace. It is our view that without these upgrades the stockhouse could not have been used for its intended purpose. We find that the stockhouse was repaired.

(b) Furnace Charging

19. The scope of work for furnace charging begins at Tab. 38 scope index no. 3.0 and continues up to and including 3.3.15. The function of furnace charging is to carry raw materials, via “skips”, from the stockhouse area to the receiver hoppers at the top of the furnace. At the top of the furnace, the materials are dumped into a small bell hopper, and from there into a large bell hopper. The large and small bell hoppers provide a double seal at the top of the furnace to prevent gas from escaping. The large bell remains closed until the small bell has transferred its material. Equipment in this section includes the skip incline, hoist house, receiver hopper, and the large and small bell hoppers. The responding party asserts that there was a replacement in kind to the furnace charging, and that any design work associated with that replacement was in fact to replace components. It is our view that a “replacement in kind” of most of the components of the furnace charging amounts to a complete reconstruction of the furnace charging.

(c) Furnace Proper

20. Dofasco Blast Furnace No. 3 is approximately 30 feet in diameter and stands 230 feet in height. The main sections of the furnace, starting from the base, are the hearth bottom, hearth, bosh and stack. The raw materials are fed into the receiving hopper, and pass through the small and large bells where they enter the furnace stack. The materials are heated in the stack, melting occurs in the bosh area and the hot metal and slag (waste material) are collected in the hearth. The outside shell of the furnace is steel construction. The inside walls are lined with cooling staves (piping) located between the shell and refractory, which forms the inside of the furnace. The scope of work done to the furnace proper is found at Tab 38 between scope index no. 4.0 and 4.10.5. The responding party asserts that the furnace proper and parts of the furnace proper were replaced in kind. We find that the vast majority of the components of the furnace proper were replaced. We find that replacing most of the components of the furnace proper is work done to repair the furnace.

(d) Casthouse

21. The casthouse refers to the building which houses the blast furnace and includes the system of guns, drills, troughs and runners by which molten product is removed and transported away from the furnace. In respect of the casthouse and in particular the runner system, Dofasco chose not to put in a newly-designed runner system but rather to repair the system that had previously existed. In our view this repair included an upgraded approach to the runner system. In particular there was a redesign in respect of the foundations for the air trough, and air cooling system.

22. The parties provided the Board with two blueprints. One reflected the runner system as it existed prior to the work performed and the second described the work done on the runners. What is clear from an analysis of the two blue prints is that the work done was a complete reconfiguration of the runner system and that the reconfiguration included what is typically construction work i.e., concrete forming, anchoring, and foundation repair.

23. In our view, the scope of work in respect of the casthouse includes aligning the runner system. Although the “cadillac” runner system referred to in Tab 39 was rejected in the final project, it is our view that the work in respect of reconfiguring the runner system is clearly an alteration from what was previously there.

(e) Stoves and Hot Blast System

24. The function of the stoves and hot blast system is to preheat air for the blast furnace. Normal stove operation consists of two cycles and therefore requires a minimum of two stoves to operate. Prior to this project, a three stove operation was used at this furnace. A decision was made by Dofasco to redesign the furnace to create a two stove operation.

25. In our view, the change from a three stove operation to a two stove operation includes the redesign of the stove system. The stove and hot blast system was radically altered from the previous three stove system.

(f) Gas Cleaning

26. The gas cleaning system is found at scope index no. 7 through to and including 7.10.9 at Tab 38. The function of the gas cleaning system is to remove dust particles in the off-gas leaving the furnace top, before the gas can be used in either the hot blast stoves or the boiler house. The dirty gas first passes through the dustcatcher which captures the larger particles and then through a wet cleaning system which removes the finer particles. The gas cleaning system has been entirely changed. The No. 3 furnace formerly used a gas cleaning system that employed an electrostatic precipitator. In our view, this is a completely new system and consequently in our view, is construction work.

(g) Services

27. Services include various plant services and utilities which are required to operate the blast furnace they include: water, steam and condensate, nitrogen, oxygen, compressed air, instrument air, natural gas, coke oven gas (COG) hydraulic, pneumatic, lube and miscellaneous piping including heating, ventilating and air conditioning (HVAC) systems. All the services were reconfigured to match the changes that were made to the stockhouse, furnace charging, furnace proper, casthouse, stoves and hot blast system and gas cleaning system. The reconfiguration on its own would not have been necessary except that these systems had to match up with the what can only be called the reconstruction of no. 3 furnace.

(h) Instrumentation

28. Instrumentation is found at scope index no. 9.0 through to and including 9.10.2 of Tab 33. Much of the instrumentation work was needed as a consequence of the upgrade that Dofasco did in 1993 by replacing the Fox 3 instrumentation system with the Bailey Infi Net 90 system. This type of upgrade to the instrumentation system would have been necessary in any event had Dofasco not shut down this furnace. In our view, the instrumentation system that was taken out was replaced in its entirety as a consequence of the logic necessary to run the Bailey system.

(i) Electrical

29. Electrical processes are required for all aspects of the furnace functioning. The electrical work is support work and one would expect that whatever electrical work is done it is in support of either maintaining the furnace or, in the alternative, constructing or repairing the furnace. This involves work performed on the stockhouse, the furnace charging, the furnace proper, the casthouse, the stoves, the gas cleaning system, services for the furnace and instrumentation and electrical work in respect of the above named components.

Decision

30. In our view almost every component in this furnace had some type of work done to it. Much of the work included re-design work and consequently work had to be performed to meet the requirements of the new design. An example of this would be taking a three stove furnace and turning it into a two stove furnace. The overall redesign had an impact on the runner system which needed to be reconfigured to serve a two stove system.

31. When viewed in its totality, the type of changes done to blast furnace no. 3, to bring it back into service, are the type of changes one would associate with repair work and/or alteration. That is, "construction work".

32. In our view the work performed on blast furnace no. 3 at Dofasco is work which properly falls within the ICI portion of the IBEW's Principal Agreement.

33. The responding party, and the intervenor General Presidents' Maintenance Committee assert that the work has historically been performed pursuant to the General President's Maintenance Agreement and consequently we should find that the work was properly performed pursuant to the General President's Maintenance Agreement. In our view the issue of past practice does not help us in determining whether the work performed was construction work or maintenance work but rather whether damages should issue as a consequence of the fact that work of this nature has been historically performed pursuant to the General President's Maintenance Committee Agreement.

34. It is not clear, and certainly the applicant contested, the arguments relied on by the General President's Maintenance Committee and Jaddco in respect of the consistency of the past practice. We would therefore remit this matter back to the parties in respect of the issue of damages. We expect the parties to review their past practice and review the damages in the context of our comments above.

35. This panel remains seized for any matters consequently arising from this decision.

CONCURRING OPINION OF G. McMENEMY; February 18, 1998

1. The General President's Maintenance Agreement ("G.P.M.A.") has over its history generated a substantial amount of work for the members of the Building Trades Unions and their employers.

2. This decision should not be interpreted to mean that this is the end of the G.P.M.A. That is not the case. The G.P.M.A. will continue to be an agreement that will be used for maintenance work in the Province of Ontario.

3. The Building Trades Unions over many years have recognized the importance of maintenance work and that the G.P.M.A. historically has been part of that recognition. It is likely and quite possible in this day and age that without the G.P.M.A. large maintenance projects could be lost to the unionized sector of the construction industry in Ontario.

4. However, it is obvious that the parties to the G.P.M.A. must develop a better structure to recognize what work is actually maintenance and what is construction. What appears to be a blanket approach taken by the General President's Maintenance Committee over the years to what work this collective agreement covers has caused great confusion for the members of their respective trades who actually do the site work under this agreement.

5. The need to involve the local unions and their members in arriving at the terms and conditions of the G.P.M.A. has never been greater, especially when one considers the recent changes to the *Labour Relations Act, 1995*.

3467-97-R Ontario Secondary School Teachers' Federation, Applicant v. **Keewatin-Patricia District School Board**, formerly known as the Kenora Board of Education, Responding Party v. Office and Professional Employees International Union, Intervener

Certification - Parties - Practice and Procedure - OSSTF applying to represent certain non-teaching employees of school board in December 1997 and Board holding representation vote in January 1998 - School board apparently amalgamating with other school boards in new "district school board" after certification application, but before representation vote - Thirty-three of thirty-four ballots cast in favour of OSSTF in vote - Rival union, but not employer, opposing certification application - Rival union representing other employees of new "district school board", but no employees of school board named in application and no employees in voting constituency - Board determining that rival union without status to intervene - Board certifying OSSTF as bargaining agent of employees of school board named in application

BEFORE: *R. O. MacDowell*, Chair.

APPEARANCES: *Josh Phillips, Shirley Dufour and Carole Stephens* on behalf of the Applicant (OSSTF); no one appearing on behalf of the employer; *Mary KcKinnon* on behalf of the Intervener (OPEIU); *Harold Vigoda*, Ontario Public School Teachers' Federation, (watching brief).

DECISION OF THE BOARD; February 20, 1998

I

1. This is an application for certification that was filed with this Board on December 16, 1997.
2. The applicant union, "the OSSTF" seeks to represent a group of unorganized "administrative and support" staff employed by the Kenora Board of Education in its schools and offices.
3. On December 17, 1997, Larry Piccinin, the Human Resources Administrator for the Kenora Board of Education, filed the school board's response - basically agreeing with the union's proposed bargaining unit description, but requesting that a representation vote be postponed until early January 1998, because of the school board's Christmas break.
4. In a decision dated December 19, 1997, this Board (differently constituted) directed that a representation vote be taken so that the employees affected by the application would have the opportunity to indicate by secret ballot, whether or not they wished to be represented by the OSSTF. In deference to Mr. Piccinin's request, the representation vote was scheduled to take place in Kenora on January 7, 1998. The voting constituency is described this way:

all regular full-time and part-time educational assistants, library technicians and library clerks employed by the Kenora Board of Education.

5. The representation vote proceeded on January 7, 1998, as scheduled, in the presence of representatives of the applicant union and the named school board. When the polling was completed, the ballots were counted. Of the 34 ballots cast, 33 ballots were cast in favour of the OSSTF.

6. In other words, the employees have indicated, overwhelmingly, that they wish to be represented by the union in any future dealings with their employer.

7. Following the taking of the representation vote, scrutineers appointed by the union and the school board executed a "certificate" verifying the regularity and sufficiency of the balloting. In addition, on January 7, 1998, Mr. Piccinin co-signed a document which reads as follows:

The parties confirm the accuracy of the Returning Officers' Report of the Vote and acknowledge that they are bound by the most recent agreements reached between them: as set out in the pre-vote consultation form, and consent to the Board issuing a decision based on this agreement without a hearing before a panel of the Board, subject to the right of any party in the seven (7) working day period following the vote, to make representations or to respond to representations, made by another party about any new matter they may be entitled to raise.

(emphasis added)

8. Neither Mr. Piccinin nor any other representative of the school board has raised "any new matter" or made any representations with respect to the disposition of this certification application. The school board has not opposed the OSSTF's application for certification. Nor has it challenged the employees' right to be represented by the OSSTF if that is their wish (which the representation vote confirms that it is).

9. However, by letter dated January 16, 1998, *another union*, the *Office and Professional Employees International Union* ("OPEIU") wrote to the Board as follows:

We represent a bargaining unit that includes educational assistants and library personnel with the former Dryden Board of Education. That Board was merged with the Kenora Board of Education and the Red Lake Board of Education to form a new district school board under Bill 104, on January 1st. We understand that there was a certification vote held January 7th among educational assistants, library technicians and library clerks at the Kenora Board, that arose out of an application by OSSTF. We understand that as of January 1st, the Kenora Board is defunct. We are, therefore, objecting to the vote, and would like to be made an Intervenor in the application. I would appreciate receiving copies of any material filed to this point.

10. When this matter was initially processed by the Board on December 19, 1997, Notice of Hearing was given to the named responding party, indicating that a hearing before the Board would take place, in Toronto, on February 2, 1998. That hearing proceeded as scheduled, and both the OSSTF and the objecting union, OPEIU, were present with their counsel. However, no one appeared on behalf of the named employer. Nor was there any communication from Mr. Piccinin or anyone else, revising the position taken in the waiver of hearing document that he executed on January 7, 1998. Accordingly, it appears that the OSSTF's application remains unopposed by "the employer".

11. I have put the words "the employer" in parentheses in the previous paragraph, because I was advised by OPEIU counsel that (as indicated in OPEIU's letter), pursuant to "Bill 104" the Kenora, Dryden and Red Lake Boards of Education have been amalgamated into a new "district school board" known as the "Keewatin-Patricia District School Board". There were no details about how this merger was effected, or what effect, if any, Bill 104 (or the terms of merger) might have on this proceeding or the rights of employees. The regulatory framework was not put before me. It seems evident, though, that the "employer" (whatever its current incarnation) is not opposing this application, nor standing in the way of the wishes of employees, so clearly expressed in the representation vote. The only opposition comes from OPEIU.

12. However, it is common ground that, as things now stand, OPEIU does not represent *any* of the employees at the (former) Kenora Board of Education; and, in particular, does not represent *any* of the employees in the voting constituency described above. Nor have any of those employees expressed any desire to be represented by OPEIU. OPEIU's current bargaining rights are confined to a grouping of employees in Dryden. OPEIU has no rights at all with respect to employees in Red Lake or Kenora. And as of the date of the hearing (February 2, 1998), OPEIU had launched no proceeding to acquire such rights.

13. It is true that it is open to someone to make application under Bill 136 to restructure bargaining units in the new district school board; and if that happens, this Board *may* be disposed to consolidate geographically diverse bargaining units, and *may* direct a representation vote, with OPEIU as one of the choices on the ballot. But as of the date of the hearing, no such application had yet been made, so that OPEIU's interest in representing employees in Kenora is totally contingent, speculative, and perhaps "tactical". (I say "tactical" because by eliminating OSSTF - despite the wishes of employees in Kenora - OPEIU may derive a competitive advantage in any future representation vote that this Board may order. That is OPEIU's only "real interest" in a certification proceeding involving OSSTF, where none of the employees has expressed any interest in OPEIU.)

14. The OSSTF challenges the right of OPEIU to intervene in this proceeding - asserting that there is no legal foundation for such intervention. OSSTF points out that OPEIU does not represent any of the employees affected by the certification application, nor have any such employees expressed any desire to be represented by OPEIU. In this respect, OPEIU is a complete "stranger" to the proceeding, and has no legal interest in the outcome.

15. In OSSTF's submission, it is insufficient that OPEIU may represent *some* employees in *some other parts* of the now-amalgamated employer's organization, or that OPEIU *might* at some point in the future be a party to proceedings before the Board under Bill 136, in which the Board *might* be called upon to consider the perimeter of OPEIU's bargaining rights and *might* revise that perimeter to include Kenora, and *might* direct a representation vote with OSSTF and OPEIU on the ballot. As of the application date, the vote date and the hearing date, there were no "Bill 136 proceedings" before the Board involving OPEIU or anyone else; and in OSSTF's submission, OPEIU's interest in *this proceeding* is entirely incidental and peripheral.

II

16. I agree with OSSTF's submission, for the reasons outlined by its counsel. In my view, OPEIU has no status to intervene or make submissions in this matter; and since the employer (however now defined) has chosen not to do so, OSSTF's application for certification stands unopposed. If there is a "Bill 136" (or Bill 104, or Bill 160) issue to be addressed, the place to do that is in an application under that legislation. Should such Bill 136 (or other) application be perfected, the OPEIU, the employer, and anyone else with a legal interest in the outcome will have the opportunity to determine the effect (if any) of the current certification application on rights under *other legislation*.

III

17. I do not propose to dilate on the possible interplay between Bill 136, Bill 104 and Bill 160, the Regulations made thereunder, and the institutional relationship between the makers of such Regulations (i.e. the Lieutenant-Governor-in-Council and the Education Improvement Commission). None of these matters was canvassed before me. All that can be said, therefore, is that if the Kenora Board has been "merged" into some broader entity, it has also been "continued" for practical purposes and possibly for legal purposes as well. It cannot be said, on the material before me, that the Kenora Board of Education has disappeared for all purposes or is totally "defunct", as OPEIU describes it.

Certainly, the behaviour of the school board officials at and after the vote does not support that inference.

18. The instruments effecting the transformation of the Kenora Board into something else may well have something to say about these matters; because, I note for example, that Bill 104 contemplates that there may be Regulations touching on: “the continuation of legal and other proceedings commenced by or against an existing board and the enforcement of Court orders and other orders affecting an existing board”, as well as Regulations affecting “any other matter that the Lieutenant-Governor-in-Council considers advisable in order to achieve an efficient and fair transfer of assets, liabilities, and employees of existing boards to district school boards” (Bill 104, section 7(9)). The parties simply did not put before me what Regulations have been made, or how they might affect the present proceeding, because no one outlined how the purported merger was effected.

19. The point is: the Board is not persuaded that any of this can or should be canvassed in the context of a certification application which was properly launched before any purported merger, and was practically continued with the participation and (at least tacit) consent of the employer representatives. The above-mentioned legislation is not expressly retroactive (at least not on the surface); and whether the terms of the various Bills and any subordinate Regulations stand in the way of the OSSTF application (and employee wishes) is a question best resolved in an application under that legislation with submissions from all affected parties - especially the nominal employer. For present purposes, it seems to me that the Board should simply proceed with the certification application as presently framed. If it later becomes necessary to reconsider that application, the Board has ample authority to do so under section 114(1) of the *Labour Relations Act*, which reads this way:

114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

IV

20. For the purposes of this application, the Board finds that the unit of employees appropriate for collective bargaining should be framed as follows:

all regular full-time and part-time educational assistants, library technicians and library clerks employed by the Kenora Board of Education.

21. In the representation vote taken on January 7, 1998, more than fifty per cent of the ballots cast by employees in this bargaining unit, were cast in favour of representation by the applicant, the Ontario Secondary School Teachers' Federation.

22. Pursuant to section 10(1) of the *Labour Relations Act*, the Board therefore certifies the Ontario Secondary School Teachers' Federation as the bargaining agent for the employees of the *Kenora Board of Education* in the above-described bargaining unit.

1842-97-G; 1843-97-G Kennedy Masonry Company Limited (“Kennedy”) and Don Valley Masonry Ltd. (“Don Valley”), Applicants v. Bricklayers, Masons Independent Union of Canada, Local 1, Labourers’ International Union of North America, Local 183 and the Masonry Council of Unions of Toronto and Vicinity (“the union”), Responding Parties

Arbitration - Construction Industry - Construction Industry Grievance - Following union’s referral of grievance to “permanent arbitrator” established under expedited arbitration provisions of collective agreement, employer referring grievance to Board under section 133 of the Act - Union asking Board to defer grievance to arbitration process under collective agreement - Board accepting employer’s submission that section 133 of the Act gives Board exclusive, pre-emptive jurisdiction when a party makes a timely referral - Board concluding that grievance properly before it

BEFORE: *R. O. MacDowell*, Chair.

APPEARANCES: *Peter Chauvin for Kennedy and Don Valley; Mark Lewis for the union parties; no one appearing on behalf of the Masonry Contractors’ Association of Toronto, Inc.*

DECISION OF THE BOARD; February 10, 1998

1. To make this decision easier to read, I will sometimes refer to the various union parties simply as “the union”, and I will sometimes refer to Kennedy Masonry Company Limited and Don Valley Masonry Ltd. as “Kennedy” or “Don Valley”, or simply “the employer”. For the same reason, the Masonry Contractors Association of Toronto Inc. (MCAT), and its union counterpart, the Masonry Council of Unions of Toronto and Vicinity (MCUTV), will sometimes be referred to simply as the “institutional parties”.

2. The Masonry Contractors Association of Toronto, Inc. (MCAT) was given notice of this proceeding because it is the employer association that bargained the collective agreement that is the basis for the case. As a party to that agreement, MCAT may have an interest in the outcome. However, MCAT has decided not to intervene.

I - The Statutory Setting

3. This matter comes before the Ontario Labour Relations Board under section 133 of the *Labour Relations Act*, 1995. Section 133 reads as follows:

133. (1) *Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 48, a party to a collective agreement between an employer or employers’ organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.*

(2) *A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within 14 days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.*

(3) *Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to*

whether the matter is arbitrable, and subsections 48(10) and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund.

(emphasis added)

Section 133 has been in the Act since 1975, and gives the Board jurisdiction to arbitrate “grievances” concerning the interpretation, application, administration or alleged violation, of “construction industry” collective agreements.

4. There is no dispute that this case involves a “construction industry” collective agreement. Nor is there any dispute that Kennedy and Don Valley are bound by the terms of that collective agreement. And there is no doubt that the union has filed a “grievance”, alleging that Don Valley and Kennedy have breached the collective agreement. These are the circumstances that, on the surface at least, should engage section 133 of the Act, and give this Board jurisdiction to deal with the union’s grievance.

5. However, for reasons that will be outlined below, there is a question about whether the Board should hear the union’s grievance on its merits, or, whether the matter should be dealt with instead, under the dispute settlement mechanism set out in the collective agreement. And since the answer to that question may illuminate the utility of such mechanisms in *OTHER* construction industry agreements, this decision will be a little more discursive than might otherwise be necessary. For the fact is, if the legal position advanced by Kennedy and Don Valley, is accepted, it could have a real impact on some current industry efforts at self-regulation - efforts which make sense from a public policy point of view, and are not at all inconsistent with the overall purposes of the statute.

6. In short, the ramifications of the employers’ legal position may go well beyond the particular facts of this case, so I think that it may be useful to sketch in both the legal and labour relations setting.

II - The “Preliminary Issue” - In Brief

7. This case began with what might be described as a “run-of-the-mill” grievance by the union, claiming that Kennedy and Don Valley had failed to comply with the terms of their collective agreement. The union alleges that between March and July 1997, Kennedy and Don Valley were employing persons on their job sites who were not members of the union, and/or that Kennedy and Don Valley have not been paying the wages or making the benefits remittances that are required by the collective agreement. These are the kind of allegations that surface routinely in the construction industry, and, over the years, have been the subject of literally thousands of “section 133 applications” to the Ontario Labour Relations Board.

8. However, as this matter developed, it ceased to be a dispute that was only about the administration of the collective agreement - that is, that was only about whether the employer(s) had, or had not, complied with their collective agreement obligations. Rather, as the case unfolded, there was an additional dispute between the parties, over the proper *forum* to arbitrate the grievance. There are two choices:

- (a) the “permanent arbitrator” designated under the collective agreement to deal with grievances of this kind; or
- (b) the Ontario Labour Relations Board under section 133 of the *Labour Relations Act*.

The union prefers option (a), while Kennedy and Don Valley prefer option (b).

9. The union argues that the grievance should be heard by the “permanent arbitrator” established under the expedited arbitration provisions of the collective agreement. The union says that these procedures were triggered *before* the employer made any reference to the Board under section 133 of the *Labour Relations Act*, and that because the “private process” was already underway, section 133 is no longer available to the employer. In the alternative, the union urges the Board to *defer* to the mechanism that the bargaining parties (i.e. the “institutional parties” - MCAT and MCUTV) have established to resolve disputes about the application of their collective agreement.

10. The union points out that the expedited arbitration system was established through a process of free collective bargaining between the union on one hand, and the employer association of the other; and that the result was intended to be binding on *all* of the employers and employees covered by the collective agreement. In the union’s submission, MCUTV and MCAT are sophisticated parties that understand the needs of their industry, so that it makes sense for the Board to try to accommodate their shared intention. The union submits that, from a policy point of view, the Board should try to reinforce the product of free collective bargaining.

11. The union maintains that the institutional parties have established an expedited arbitration process that is specifically tailored to the requirements of their sector of the construction industry, and they have provided for a single, permanent, adjudicator, who was selected by them because of his expertise. In the union’s submission, that single adjudicator can respond much more quickly than the Ontario Labour Relations Board; moreover, a single “umpire” who hears all of the cases, is much more likely to achieve the uniform interpretation of the collective agreement that the institutional parties require. In the union’s view, it is a laudable effort at industry self-regulation, which the Board should support.

12. In the union’s submission, this “private system” guarantees a level playing field for all of the unionized employers and employees covered by the collective agreement, and establishes an arbitration mechanism that is clearly superior to the one available under section 133 of the *Labour Relations Act*. Not only is the negotiated scheme a more specialized process, tailored to the needs of the industry, but it is also faster, more flexible, and more effective than the statutory alternative. It ensures the prompt and equitable resolution of disputes, which, the union says, promotes the goal of industrial peace.

13. The union urges the Board not to undermine the negotiated system, which the bargaining parties have developed *precisely because it was better than the option available under section 133 of the Labour Relations Act*. In the union’s submission, section 133 should not be read so as to preclude a *more efficacious* private process.

14. Kennedy and Don Valley do not agree that the negotiated process is “better” - at least from their point of view. They prefer the procedures available from the Labour Relations Board, under section 133 of the Labour Relations Act. However, Kennedy and Don Valley argue that whether or not the expedited system is “better” from some perspective, section 133 of the Act *pre-empts* the negotiated arbitration provisions of the collective agreement, and thus gives them the right to come to the Board, *regardless* of what the collective agreement might say. In counsel’s submission, the language of section 133 is clear, and the bargaining parties cannot “contract out of the statute”.

15. The parties are agreed that the issue of “forum” should be resolved before considering the merits of the grievance. However, before turning to that “forum question”, I think that it might be helpful to briefly record the way in which this case unfolded. I will then turn to the origins and purpose

of section 133, and will consider whether, in the circumstances of this case, the terms of section 133 override the negotiated provisions of the collective agreement.

16. The chronology is not really in dispute.

III - How This Case Unfolded

17. The Masonry Council of Unions Toronto and Vicinity (MCUTV) is a council of unions that negotiates with an employer association known as The Masonry Contractors Association of Toronto Inc. (MCAT). The result of the bargaining between MCAT and MCUTV is a so-called “master agreement”, which is binding upon the various union parties, the employers who are members of MCAT, and any other employers who choose to “sign on” later (i.e. whether or not they are actually members of MCAT). The master agreement establishes uniform terms and conditions of employment for the employers and employees covered by the agreement, as well as a common framework for resolving union/employer disputes.

18. Kennedy is a member of MCAT and is therefore directly bound by the MCAT/MCUTV master agreement. On April 26, 1996, Don Valley signed a memorandum of agreement with MCUTV agreeing to renew its expired agreement with MCUTV on the terms that had recently been negotiated between MCUTV and MCAT. Accordingly, it does not seem to be disputed that, as of the date of the union’s “grievance” in the summer of 1997, both Kennedy and Don Valley were bound by the 1996-98 master agreement negotiated by MCAT and MCUTV.

19. The 1996-98 master agreement specified the terms and conditions of employment for the employees represented by MCUTV and its constituent unions. However, the master agreement also contained a joint undertaking by the institutional parties to develop an expedited arbitration system, to address routine violations of the collective agreement. And by the spring of 1997, MCUTV and MCAT were in a position to finalize that process.

20. In the spring of 1997, the institutional parties agreed to implement a new system of expedited arbitration which they called the “1997 Bricklaying Enforcement System”. However, that new system did not go into effect until May 1997, so that MCAT would have an opportunity to inform its members about the new process. Thereafter, though, expedited arbitration would be a permanent feature of the master agreement, and would be binding on all of the employers who were bound by that master agreement - including Kennedy and Don Valley. And as its name suggests, the purpose of the new system was the speedy enforcement of collective agreement obligations.

21. By letters dated July 15, 1997 and July 24, 1997, the union advised Kennedy and Don Valley that it was grieving their failure to adhere to the terms of the collective agreement. The union contended that the two companies had failed to employ out-of-work union members on certain construction projects in which they were then engaged, and/or had failed to make the proper wage and benefits payments. The union complained that the violation began in March 1997, and was continuing to date. The grievance letters conclude with the following paragraph:

Failure to resolve this matter within five (5) days of the receipt of this grievance will result in its referral to arbitration before the Ontario Labour Relations Board pursuant to section 133 of the *Labour Relations Act*.

22. As will be seen, the letter warns that if the matter is not settled in a satisfactory manner, the grievance will be referred to the *Ontario Labour Relations Board* for arbitration. However, that is not what happened. The grievance was not referred to the *Board*. Instead, by letter dated August 14, 1997,

Kennedy and Don Valley were informed that the grievance was being referred to the *permanent arbitrator*, established under the expedited arbitration provisions of the collective agreement.

23. I am told that this is the way the system normally operates. The grieving party (here the union) obtains a date from the expedited arbitrator, then gives notice to the other side that the expedited process has been triggered. There is no advance notice that the expedited route will be taken, and no advance notice was given in this case. Kennedy and Don Valley were merely advised that instead of going to the Ontario Labour Relations Board, the union was proceeding to arbitration under the terms of the collective agreement.

24. The letter of August 14, 1997 also noted that the union was seeking a pre-hearing order (*ex parte*) requiring Kennedy and Don Valley to bring to the hearing:

... all their books and records, including but not limited to payroll records, relating to masonry work performed on any projects, for the period commencing October 1, 1996 and continuing thereafter to the date of the hearing.

The next day, August 15, 1997, the expedited arbitrator issued the following brief decision:

Bricklayers, Masons Independent Union of Canada, Local 1, L.I.U.N.A., Local 183, and Masonry Council of Unions, Toronto and Vicinity (the "Union") and Kennedy Masonry Company Limited/ Don Valley Masonry Ltd.

1. MCUTV has made application for an expedited arbitration pursuant to the "1997 Bricklaying Enforcement System". A hearing has been scheduled for Wednesday, August 20, 1997 at the Main Boardroom of Labourers' Local 183, at 1263 Wilson Avenue, North York, Ontario.

2. The Board has also received a request from MCUTV, copied to Kennedy Masonry Company Limited/Don Valley Masonry Ltd., that Kennedy Masonry Company Limited/Don Valley Masonry Ltd. be directed to bring with it to the hearing all its records related to masonry work performed on any projects, for the period commencing October 1, 1996 and continuing thereafter up to the date of the hearing.

3. The Board sees no reason not to make the requested direction. If Kennedy Masonry Company Limited/Don Valley Masonry Ltd. brings its records, it will likely save hearing time and will also likely reduce the need for an adjournment. It does not appear as if Kennedy Masonry Company Limited/Don Valley Masonry Ltd. will be prejudiced in any way by such an order, since it would not be required, at this point, to turn these records over to MCUTV. It would only be required to bring them to the hearing.

4. Accordingly, the Board hereby directs that Kennedy Masonry Company Limited/Don Valley Masonry Ltd. bring with it to the hearing on Wednesday, August 20, 1997 described above, all of its books and records related to masonry work performed on any projects, for the period commencing October 1, 1996 and continuing thereafter up to the date of the hearing.

Dated at Toronto, Ontario, this 15th day of August, 1997.

At the same time, the expedited arbitrator issued a notice of hearing, stipulating that a hearing would take place on the evening of Wednesday, August 20, 1997, at the offices of Labourers' Local 183, beginning at 6:30 p.m.

25. These expedited arrangements - including the evening hearing at the union offices - are an established part of the expedited arbitration system, and are spelled out, in some detail, in the collective agreement. Moreover, because the expedited arbitrator is "permanently on-call" to respond to problems of this kind, the process can move with considerable dispatch. That is what happened in the instant case - just as the collective agreement contemplates.

26. Copies of the decision and the letter fixing the hearing date were faxed to counsel for the union, to the Toronto Residential Construction Labour Bureau, to Labourers' Local 183, to the Labourers' Contribution Control Office, and to the General Manager of MCAT. However, it appears that the expedited arbitrator had no fax number for Kennedy and Don Valley, so that the two companies did not receive their notice of hearing or their copy of the "production order" until Monday, August 18, 1997. In the result, Kennedy and Don Valley had only a couple of days to prepare for the hearing. But of course, that kind of speed (reminiscent of injunction proceedings in the Courts) is what is contemplated by the collective agreement.

27. On Monday, August 18, 1997, counsel for Kennedy and Don Valley informed counsel for the union that the two companies had filed a referral to arbitration under section 133 of the *Labour Relations Act*. It is conceded that this referral was a response to the hearing notice, and reflects the employers' preference (*inter alia*) for the procedures of the Labour Relations Board. For a variety of reasons, the employer did not want to submit to the expedited arbitration process set out in the collective agreement.

28. On August 20, 1997 the parties agreed to adjourn the expedited arbitration hearing scheduled for that evening, without prejudice to any arguments that either party might have regarding the matter.

29. The section 133 referral to the Ontario Labour Relations Board was scheduled for hearing before the Board on September 2, 1997. However, that scheduled hearing was adjourned at the request of the parties - subject to an agreement that the union would *not* request that there be another hearing before the expedited arbitrator, until *this Board* had dealt with the "forum issue".

IV - The Preliminary Issue Restated

30. The question, then, is whether the "private" arbitration process can or should be derailed by a reference under section 133 of the Act - which is to say, whether on the facts of this case, the provisions of section 133 override the negotiated provisions of the parties' collective agreement. However, as I have already mentioned, that question involves an interpretation of section 133 with potential ramifications beyond the immediate case; and with that in mind, it may be useful to say something about the origins of section 133, and the collective bargaining problem to which it was addressed.

V - Collective Agreement Enforcement in the Construction Industry - Some Environmental Problems and the Legislative Response in 1975

31. A construction company is not like an industrial enterprise, and a construction site is not like a factory. That is stating the obvious. However, from a collective bargaining perspective, the differences give rise to some unique problems and institutional arrangements, because the overriding reality in construction - for employers and employees - is that work is irregular and transitory. And that, in turn, means that it is harder to establish stable collective bargaining arrangements, and there is much less latitude for leisurely methods of dispute resolution. In the construction industry time really is "of the essence", for if a problem is not resolved quickly, the job will be over, and the affected parties may no longer be readily available.

32. In the construction industry, workers typically have no permanent work location and no settled relationship with any particular employer. "Tradespersons" move from job to job and employer to employer as work opportunities arise. I say "trades persons" because that is what these workers usually are: they are carpenters, plumbers, electricians, sheet metal workers, bricklayers, labourers, and so on. Workers are identified with a particular trade, and that trade is the basis for trade union

organizations as well (i.e. the Carpenters' Union, the Sheet Metal Workers' Union, the Labourers' Union, etc.).

33. Because employment is transitory, construction workers have a stronger connection with their trade union than with any single employer, and those trade unions take on functions which, in other settings, would be undertaken by the employer (or perhaps some government agency). For example, individual construction employers do not normally operate their own pension, welfare or benefit plans. Rather, they contribute to such funds operated by the union, or established on a broader basis by the union in conjunction with an employer association. Similarly, unionized construction employers usually do not hire "off the street", but are required to meet their labour force requirements by hiring out-of-work union members, referred to them from the "hiring hall" operated by the trade union.

34. All of these features of the environment are reflected in the collective-bargaining process, in collective bargaining institutions, and in the typical contents of construction industry collective agreements. They are also reflected in the kinds of disputes that typically arise. That is why I mentioned earlier that it is fairly common to see grievances alleging a failure to hire out-of-work union members, or a failure to pay the wages and benefits stipulated in the collective agreement. Those kinds of violations routinely arise, because, when employers depart from one site and begin a new job, in a new location, with new employees, they are sometimes tempted to ignore the terms of their collective agreement.

35. However, the transitory nature of work is not just a feature of the "*employee side*" of the bargaining table. There is a similar fluidity on the "*employer side*" as well.

36. Some construction companies are quite large. But the vast majority are relatively small, and, like their employees, move from job to job, and place to place, in accordance with the vagaries of the marketplace. Most of these construction companies are also organized along "craft lines" (electrical contractors, plumbing contractors, masonry contractors, etc.) just like their union counterparts; and they obtain their work by bidding against similarly situated business competitors. And, of course, in that context, labour costs are a critical part of the bidding equation, because a subcontractor with lower labour costs can fashion a more competitive bid.

37. The multiplicity and mobility of small employers poses a real challenge for trade unions, so that in construction industry collective bargaining, those trade unions usually try to tie in as many employers as possible, over as broad an area as possible, and usually insist upon uniform terms and conditions of employment for all workers in the trade (i.e. wherever they may be working, and whoever they may be working for). There are, of course, both sectoral and regional variations. But the union's general objective is uniformity of treatment, wherever the skilled employee happens to be working.

38. The union's interest in uniform treatment is obvious enough: from the union's perspective, workers "should" be paid for their skills - wherever they are working, and whoever they are working for. Unions have little patience for non-union employers who undercut "union rates", or for unionized "cheaters" who fail to pay the rates stipulated in their collective agreements. The answer to the first challenge is vigorous organizing, to bring as many employers as possible under the collective bargaining umbrella. The answer to the second challenge is the vigorous enforcement of the collective agreement.

39. It is easy enough, therefore, to see why *trade unions* might want to maintain uniform wage rates, and will try to enforce compliance with the negotiated terms. The effective enforcement of the agreement provides immediate benefits for their members, and acts as a deterrent for other employers, who might be tempted to dodge their contractual obligations. So, from a trade union point of view, "policing the agreement" is important.

40. However, *unionized employers* are also interested in these objectives. Indeed, in this regard, *unions*, and *unionized employers*, share a common interest.

41. No doubt most employers in the construction industry have as little appetite to deal with trade unions as employers in other sectors of the economy. There is nothing unlawful or particularly surprising about that. Being “non-union” can sometimes give a commercial advantage, because it usually means lower labour costs.

42. However, once a group of companies becomes “unionized”, *those same employers* have an economic interest in maintaining the negotiated rates - which is to say, preventing their unionized competitors from undercutting those rates, either through negotiating “preferential treatment” or through undetected non-compliance with the collective agreement. In either case, the unionized competitor can obtain an illegitimate cost advantage, that works in its favour in the bidding contest, and to the detriment of both *unionized employees* and *other unionized employers*.

43. While all of this may seem obvious, it is worth emphasizing again that, once bound by a collective agreement, all unionized *employers* have an interest in ensuring that those against whom they bid do not obtain a competitive advantage by undercutting the negotiated wage rates. Employers want a level playing field. They want the collective agreement effectively enforced. That is why there is often broad *employer support* for expedited arbitration mechanisms of the kind that one finds in the master agreement between MCAT and MCUTV. Employers benefit from contract compliance, and are prejudiced if the agreement is not properly “policed”.

44. On the other hand, there are also economic pressures to break ranks and disregard the collective agreement if an employer thinks that it can get away with it, because that may give the defaulter a competitive advantage in a bid-driven system. An employer so inclined will also know that the longer the breach of the collective agreement goes undetected, or the longer it takes for the union to obtain effective redress, the greater the economic/competitive advantage will be. Accordingly, once an employer departs from the negotiated terms, furtiveness and delay operate in its favour, because it may be able to complete a job undetected and move on to somewhere else, (perhaps with a new name or a new corporate vehicle) before the union learns about it or can marshal a legal response.

45. This is not to suggest that employers in the construction industry typically disregard their collective agreement obligations. Nor do I suggest that Kennedy and Don Valley have done so in this case. However, the minority of employers that *do* breach their collective agreements, provide the bulk of the Board’s work under section 133 of the *Labour Relations Act*. These days, the Board receives well over a thousand such applications a year.

46. In summary then: in the construction industry, alleged breaches of the collective agreement occur fairly regularly, and employers and trade unions are *both* interested in an effective mechanism for enforcing those agreements, before the job is over and everyone moves on. *And so is the Legislature*. Because, if a trade union becomes frustrated in its attempt to enforce employee rights by *lawful* means, the reality is that it may be tempted to use *unlawful* strikes or picketing. That interferes with third parties, delays the completion of construction projects, and undermines general labour relations stability.

47. Nevertheless, for the reasons already mentioned, it may well be (or appear to be) in an employer’s commercial interest to avoid its collective bargaining responsibilities to secure a business advantage; and as the law stood in the early 1970’s, there were plenty of ways to do that if an employer were so disposed. Indeed, as the law then stood, an employer could breach the agreement with relative impunity, secure in the knowledge that it would take weeks or months before the union could seek redress at arbitration.

48. In the standard arbitration model then contemplated by the statute, the union and employer were expected to agree on the arbitrator (or a three person arbitration panel) and were then invited to agree on mutually acceptable hearing dates. Accordingly, any disagreement, at any level, would generate delay - as would any requirement to accommodate the calendars of counsel or witnesses or members of the panel itself. Thus, by the time a typical "construction case" came on for hearing before the arbitration board - say, to collect unpaid wages - the job could well be over, the employees affected may have dispersed, and the employer might have left town or metamorphosed into a new corporate entity, (purportedly discarding its collective bargaining agreement at the same time). And since there was nothing unlawful about any of this, it is not surprising that employers sometimes took advantage of the tactical opportunities open to them - to the detriment of their employees, but also to the detriment of their more conscientious commercial competitors.

49. Given the transitory nature of construction projects, the "private" grievance-arbitration mechanism, was simply too slow to provide an effective remedy, because it was relatively easy to create delays when the constitution of an arbitration board and the scheduling of arbitration hearings depended upon employer cooperation. In that context, it was not difficult for employers to "drag their heels" and "buy time". And many employers did just that.

50. On the other hand, it is also not surprising that when faced with such delaying tactics, trade unions often responded with strikes and picketing - even though that response was unlawful. From a trade union perspective, the remedies provided by law were obviously ineffective; while a strike would quickly bring the defaulting employer into line. A strike put immediate pressure on the employer to abide by its obligations, and enlisted other employers on the site as unwilling allies, because they too were interested in having the dispute resolved quickly. In addition, a strike nicely "turned the tables", on the "rogue employer", forcing *it* to resort to what was then a cumbersome litigation process to seek legal redress.

51. In the result, prior to the mid-1970's, the grievance-arbitration mechanism mandated by the statute had little practical application in the construction industry. Where there was a dispute about the interpretation, application, administration or alleged violation of a construction industry collective agreement, the parties would either sort it out amicably between themselves, or the aggrieved trade union would resort to self-help, threatening a strike or picketing, unless the grievance was resolved. And because a strike or picketing aimed at one subcontractor would inevitably affect others, the whole work site could be drawn into the fray. That is what gave the union more leverage in resolving the dispute, but it also highlighted the deficiency in the arbitration process, and created a broader constituency for change: unions and employers *both* needed a better way to resolve disputes.

52. This unsatisfactory situation was addressed by the Legislature in a series of amendments between 1970 and 1975.

53. In 1970, the Ontario Labour Relations Board was given the authority to issue a speedy "cease-and-desist order" in respect of unlawful strikes or picketing in the construction industry. That relief was available, on very short notice (24 to 48 hours), not only to the immediate target of the unlawful pressure, but also to any other affected person on the job site (see what is now section 144(1) of the Act). In 1971, the Legislature introduced the "related employer" provisions of the Act (now section 1(4)), which prevent an employer from escaping its collective-bargaining responsibilities by spinning off a new corporate shell - something that employers were then doing with increasing frequency. And in 1975, the Legislature made the Ontario Labour Relations Board the permanent "expedited arbitrator" for disputes concerning the interpretation, application, administration or alleged violation of construction industry collective agreements.

54. Pursuant to the new section 112a of the Act (now section 133), construction industry grievances could be referred to the Ontario Labour Relations Board, for final and binding determination, and the Board was obliged to hold a hearing within 14 days. The negotiated dispute settlement procedures no longer governed. Access to the Board was available:

"Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section [48] ..."

55. That phrase reflects a conscious legislative choice. It substitutes a *public process* for the *privately-negotiated mechanisms* that had proved so ineffective. And once there has been a referral to the Board, the Board acquires *exclusive jurisdiction* to hear and determine the matter (see now section 133(3)). The Board's jurisdiction is not *concurrent*, it is *exclusive*.

56. The Board was intended to provide certainty, expertise, speed, flexibility and finality - all of which were lacking in the system as it was before 1975. And at the time, the prospect of a hearing within two weeks was truly breathtaking speed.

57. It is worth emphasizing, though, that the objective of section 133 was not to provide "cheap arbitration" for private parties. Nor did it necessarily reflect a value judgment that *public* processes were to be preferred to *privately* negotiated ones. Rather, the Board was selected and given exclusive jurisdiction, because these disputes had an impact beyond the immediate parties, because, at the time, there was no viable alternative, and because the arbitration of construction industry agreements fit reasonably well with the Board's general regulatory authority. Access to the Board provided an arbitration alternative, in a setting where, for practical purposes, the existing model simply did not work.

58. Now, of course, from a more panoramic perspective, the Board also provides a unified forum for addressing the interplay between negotiated collective agreements and the special legislative provisions relating to the construction industry; so there may be other good policy reasons for giving the Board jurisdiction to resolve these disputes, quite apart from the failures of the standard arbitration process. The arbitration jurisdiction complements the Board's general regulatory role, and facilitates "one stop shopping" for adjudication in the construction industry. It allows the Board to harmonize the various elements of the legal scheme.

59. It is worth remembering, though, that, the original purpose of section 133 had a narrower, more practical, focus: to "institutionalize" conflict and dispute resolution in a way that the bargaining parties had not been able to do effectively by themselves. That is why the legislative changes in the early 1970's had two related components: an expedited process for dealing with unlawful strikes (now section 144 of the Act), *AND* an expedited arbitration process that would make resort to strikes unnecessary (now section 133 of the Act).

60. That said, it is also worth noting that the construction industry, today, is very different than it was in the early 1970's. While many of the problems remain the same, the institutional arrangements spawned by provincial collective bargaining have resulted in collective agreements that are quite different from those that were negotiated 30 years ago; and, with the spread of extended area bargaining, employer associations and trade unions are better able to "police" the negotiated regime - to their mutual benefit, as noted above.

61. It is these systemic changes that have prompted institutional parties like MCAT and MCUTV to develop their own expedited arbitration systems.

VI - The Problem of Enforcing Collective Agreements in the Construction Industry - Some Recent Responses of Bargaining Parties

62. Whatever the merits of section 133 may be, in recent years, trade unions and employer associations have developed an increasing appetite (and ability) to develop their own arbitration systems - at least for routine "collection cases". Partly this is the result of the increased size and sophistication of the bargaining parties (especially employer associations and councils of unions - like MCUTV and MCAT). However, it also reflects a practical reality: *if the will is there*, the bargaining parties can create an enforcement mechanism that is faster, more effective, and ultimately cheaper than the one available under section 133 - even though they have to pay for it themselves. And, because the "impact of noncompliance" is not just born by employees and trade unions, but impinges on other employers as well, "institutional parties" like MCUTV/MCAT have begun to explore their own "private" enforcement mechanisms.

63. The other practical reality these days is that if a case cannot be completed in the *one day* that the Board is obliged to set down within 14 days, the case may not be completed very quickly at all; for, regrettably, in a litigation model with limited formal pleadings or pre-hearing discovery, it does not take much imagination for a recalcitrant employer to "string a case out" beyond that one day - to the detriment of employees, but also to the detriment of business competitors who have adhered to their contractual obligations. And, like all public sector institutions, the Board has been subjected to financial restraints and "downsizing", which have reduced its adjudicative resources and hearing flexibility. So whatever the statute might say, the Board is simply not as quick as it used to be.

64. Now, again, I do not suggest that Kennedy or Don Valley are "rogue employers" seeking to avoid their collective bargaining responsibilities, or that Kennedy and Don Valley are unnecessarily "stringing out" their case. Nor do I make any comment on the merits of their position. I simply wish to illustrate why, in recent years, "private" expedited arbitration systems have become increasingly popular, and can, in fact, provide a more effective alternative than section 133.

65. For present purposes, I do not propose to examine the details of the particular expedited arbitration mechanism found in the Masonry Contractors' collective agreement (not least because there is a debate between Kennedy/Don Valley and the union about whether *any* elements of that scheme can or should be applied by the Ontario Labour Relations Board). It suffices to say that it has a number of features that are quite different from the statutory scheme, and reflect not only the union's interest in securing redress for its members, but also the employer association's interest in maintaining adherence to the negotiated regimen. For example: hearings can be held on very short notice, in the evenings, at the union's premises; the expedited arbitrator need not accommodate the schedule of any counsel who may be retained; the expedited arbitrator need not apply the principle of "estoppel" (which would relieve one competitor of obligations to which the others must adhere and would indirectly sanction individual bargaining); and so on.

66. Whether these elements of the scheme can or should be enforced by the Ontario Labour Relations Board is not here relevant. The question is whether an individual employer can opt out of this privately negotiated process, and insist upon having its case heard by the Board.

67. In my view, that is not a "pure policy question", but, rather, depends upon the proper interpretation of section 133.

VII - Discussion and Decision

68. From a purely "policy" point of view (i.e. what is best for labour relations in the construction industry), it seems to me that the union's position is unassailable. After all, section 2 of the *Labour Relations Act, 1995* includes these stated "Purposes":

- To recognize the importance of workplace parties adapting to change.
- To encourage co-operative participation of employers and trade unions in resolving workplace issues.
- To promote the expeditious resolution of workplace disputes.

69. The expedited arbitration mechanism is consistent with *all* of these themes. The institutional parties in this case have adapted to the changing environment of the construction industry. They have participated in developing their own mechanism for resolving workplace disputes. And they have created a more expeditious process than the one available under the statute, in a context in which expedition is important. In fact, despite Kennedy's objection, the institutional parties' arrangement probably accomplishes the stated statutory objective much *better* than the statutory model does. Moreover, it makes no demands at all on the public purse.

70. Now, no doubt, in 1975, no one seriously believed that bargaining parties would, or could, negotiate their own expedited procedures. Nor did they - then. That is why legislative intervention was necessary; and, even today, the prospect of a hearing within 14 days of filing a grievance is relatively speedy compared to most negotiated alternatives. The fact remains, however, that construction collective bargaining at the millennium is not the same as it was 30 years ago, so that at least in some settings, section 133 is arguably redundant because the parties have effectively addressed the problems themselves.

71. However, the fact that, in some circumstances, the statutory scheme may be obsolete or counterproductive, does not mean that it does not apply. Nor does it matter that the "private process" may be more beneficial overall, and is completely congruent with the statutory "Purpose". If there is an irreconcilable collision between the *terms* of the collective agreement and the *terms* of the statute, it is the statute which must prevail.

72. But is there such operating incompatibility in this case?

73. Alternatively, has the employer done something which precludes access to section 133?

74. On this latter point, the union says that this case is on all-fours with the Board's decision in *Spiers Brothers Limited*, [1977] OLRB Rep. April 227.

75. In *Spiers Brothers*, a trade union filed its grievance on August 9, 1976, and the agreement contemplated that the matter would be adjudicated by a tripartite arbitration board. The employer appointed its nominee on September 21, 1976, a chair of the board of arbitration was eventually selected, and a hearing was fixed for January 10, 1977 (a 5-month delay, be it noted). However, that hearing was derailed because of a snowstorm - although, as it happened, the arbitration panel had other available dates in January, so the panel could be reconstituted within a couple of weeks. At that point, though, the union decided to abandon the "private arbitration route", and filed an application to the Ontario Labour Relations Board - knowing that the case would come on for hearing before the Board in 14 days. But the employer objected to the matter proceeding before the Board, and in late March 1977, the Board issued the following ruling:

7. Section 112a was enacted to provide parties in the construction industry speedy access to the resolution of their grievances by arbitration. This procedural reform was made necessary because delays in the normal course of private arbitration had reduced the value of private arbitration to something close to the vanishing point in the construction sector. In the construction industry where workers are transient, projects are short-term and employment relations are prone to be short lived, a late arbitration remedy is often as good as no remedy. As a result, aggrieved employees and unions were prone to resort to work stoppages and the wildcat strike to resolve disputes that would

normally have been the subject of arbitration. This is the mischief that gave rise to the enactment of section 112a of the Act. (For a more complete account of the background to section 112a, see *The Lummus Company Canada Limited, and The Ontario Erectors' Association*, [1976] OLRB Jan. 980 at 983.)

8. In the instant case the parties have constituted a board of arbitration to dispose of the grievance. At the time of the postponement of its proceedings that board remained accessible to the parties within the same time as this Board would be under section 112a of the Act. Counsel for the respondent has argued that in this circumstance the grievance ought not to be seen as arbitrable by this Board. We agree.

9. Section 112a of the Act is framed so as to confer on this Board all of the powers that would be exercised by a board of arbitration constituted under section 37 of the Act, including the issue of the arbitrability of a grievance. In the instant case, we are of the view that this matter is properly before the board of arbitration constituted by the parties and is therefore not arbitrable by this Board.

To this, the dissenting member of the Board penned a long response, which I think is worth reproducing in full:

1. I dissent. In my view the majority has erred in its construction of section 112a of The Labour Relations Act, and as a result, has failed to exercise the exclusive jurisdiction to hear and determine the matter before us.

2. The parties herein are also parties to a collective agreement. In August of 1976 a dispute arose between them concerning the proper interpretation of their agreement, and the trade union filed a written grievance alleging certain violations. This grievance was apparently processed in accordance with the grievance procedure in the collective agreement, and eventually a board of arbitration was constituted pursuant to the arbitration provisions of that agreement. A hearing was scheduled for January 10th, 1977 at Sudbury - that is, some 5 months after the grievance was first filed. Through no fault of the parties the board established pursuant to the arbitration provisions of the collective agreement was unable to hold the hearing or begin its consideration of the matters in dispute.

3. While the law is not entirely clear, it would seem that an arbitrator does not begin his quasi-judicial function until such time as the hearing is actually held and he begins to entertain the evidence and/or submissions of the parties. In *Re Taylor and C.N.R.* (1913), 9 D.L.R. 695 (C.A.) the Manitoba Court of Appeal was called upon to determine at what point an arbitration could be said to be "pending". That Court determined that an arbitration was not "pending" until its judicial (as opposed to administrative) functions had actually commenced. As Perdue J.A. remarked (at p. 700):

"An arbitrator is not appointed until he has been both named in the order and has accepted office as such; and he enters on the reference, not when he accepts the office, or takes on himself the functions of arbitration by giving notice of his intention to proceed, but when he enters into the actual matter of the reference".

4. The Manitoba Court applied the old case of *Baker v. Stephens* L.R. 2 Q.B. 523 where the English Court of Appeal had distinguished between the administrative functions of "accepting the office" of arbitrator and "exercising the functions of" arbitrator. In any event, it is evident to me (and this was not seriously disputed) that the "private board" constituted pursuant to the terms of the collective agreement has not entertained the evidence or the submissions of the parties, nor has it begun its enquiry into the difference between them nor has it sought to exercise any of the powers which are accorded to it under The Labour Relations Act. That Board has been constituted pursuant to the arbitration provisions of the collective agreement, and may have received a copy of the written grievance, but nothing more has yet occurred.

5. Unlike the "private" board of arbitration which is constituted pursuant to the collective agreement (albeit because the parties are required to include such term in their agreement) the jurisdiction of The Labour Relations Board has *pre-eminent* rather than simply *concurrent* jurisdiction.

• • •

This section is clear and unambiguous. It plainly provides that “notwithstanding the grievance and arbitration provisions in a collective agreement ... either party ... may ... *at any time* ... refer a grievance to the Board for a final and binding determination”. Once referred “the Board shall appoint a day for, and holding a hearing ... and has *exclusive* jurisdiction to hear and determine the differences”. In this case the applicant union has properly referred a matter to us. Nevertheless, this Board has refused to “determine the differences” between the parties. The majority of this Board has said that because the union, pursuant to the arbitration provisions of the collective agreement has participated in the selection of a “private” board of arbitration, it cannot refer the matter to this Board.

7. I do not see how the majority can reach this result. The decision ignores the clear language of the statute which explicitly provides that a reference may be made, *at any time notwithstanding the arbitration provisions in a collective agreement*. In any event, there is no doubt (and the majority has conceded) that there *is* a reference before us under section 112a. In such circumstances, our jurisdiction to determine the dispute is *exclusive*. We are under a statutory obligation to hear and determine the matters in dispute. We cannot avoid this responsibility because of the existence of an alternative forum under the provisions of the parties’ collective agreement. Once the reference is made to us, the “private” process is no longer available.

8. In this case there is no doubt that there is a dispute between the parties concerning the interpretation of their agreement. It has not been submitted that there is no collective agreement, or that the conditions precedent to our jurisdiction have not been fulfilled, or that the panel is disqualified by bias, or indeed any other reason why the matter is not “arbitrable” - save that the arbitration provisions of the agreement provide for an alternative forum and that we should therefore “defer” to that forum. In other words, the sole submission to us is that we should disregard the statute giving us *exclusive* jurisdiction, or in the alternative that our jurisdiction is not *exclusive* because of the conduct of the parties pursuant to the arbitration provisions of their collective agreement. In my respectful submission, *exclusive* means *exclusive*. There may be a number of reasons why a matter is not arbitrable, but the existence of a negotiated alternative is not one of them. This Board has already held that the parties are *not* required to exhaust the grievance provisions in their agreement before resorting to this Board (see *Lummu of Canada Ltd.* [1976] OLRB Rep. (Jan) 980). The language of section 112a could not be clearer on this point.

9. The union originally filed its grievance in August of 1976. The matter was originally scheduled to be heard on January 10th, 1977. Following the abortive hearing on January 10th, the union had two alternatives:

- (1) it could seek agreement on alternative dates which would be acceptable to the Board Chairman, the nominee, the parties, the witnesses and counsel; or
- (2) it could refer the matter to The Labour Relations Board and be assured of a hearing on the merits within fourteen days.

It may well be that the parties might have reached an agreement which would have permitted a hearing to be held at least as expeditiously as the proceeding before this Board. The evidence indicates that the union chose to pursue the second, surer alternative, and refer the matter to this Board - a course of action which in my view it was perfectly entitled to take. By referring the matter to this Board, the union was assured of an expeditious resolution of the dispute (or so it thought). It would also have access to the services of a labour relations officer who could meet with the parties and perhaps effect an amicable settlement. No such dispute settlement technique is available under the agreement.

10. The union chose to refer the matter to us, and I fail to see how the respondent employer is in any way prejudiced by that decision. Indeed it is probable that the overall cost of the arbitration proceeding has been substantially reduced. By virtue of section 112a, this Board has been substituted for the “private” board which was originally scheduled to hear the matter. It is not suggested that this Board is any less qualified than the board chaired by Professor Abbott; and even if it were, that argument is irrelevant in light of the language of section 112a. The union and company have prepared for an arbitration proceeding, and that is what this Board will provide. There is no prejudice in the substitution of this panel, particularly where the “private” board has not even begun its enquiry into the matters in dispute.

11. I concur with the majority view regarding the intention of the Legislature in enacting section 112a. Access to this Board allows for the resolution of collective agreement disputes in the construction industry in a manner which is faster and cheaper than the "private" process formerly available. Moreover, the intervention of a labour relations officer has in fact resulted in the settlement of a considerable number of disputes without reference to a hearing at all. In view of the legislative concern for expedition, it is surely ironic that this Board has reached a conclusion which will result in further, substantial delays. Had we taken jurisdiction - as I believe we were required to do - the entire matter might well have been disposed of by now. As a result of the majority's decision, the parties are now faced with the task of seeking agreement on new date(s) for the hearing which will be convenient for: the Chairman, the nominees, the witnesses, and counsel. Surely this is an absurd result - particularly in light of the explicit language of section 112a and the intention of the Legislature.

12. The majority opinion amounts simply to this: "the trade union might have chosen to bring the matter before this Board if it had acted earlier, but following the constitution of the 'private' board and the fixing of a hearing date, it was 'too late' and the union has waived its right to come before this Board". Apart altogether from the difficult issue of whether a party *can* waive these statutory rights, there is simply no evidence of prejudice which would persuade me to apply such a doctrine. This Board is rightly concerned that orderly collective bargaining might be impeded if parties were allowed to "change horses at the eleventh hour". This argument would have considerable force if a party were seeking to bring a proceeding before this Board after a "private board" had begun its consideration of the matters in dispute. That is not this case, but even if it were, it is the obligation of this Board to exercise its responsibilities under the statute. If that statute is defective, it is up to the Legislature to amend it; it cannot simply be ignored.

13. The common law courts are not unfamiliar with the problem before us. It is not unusual for a party to commence arbitration or stay the arbitration proceedings and subsequently seek to have the same matter litigated in the courts. In such circumstances the courts have a discretion (inherent in their power to control their own proceedings) either to defer to arbitration or stay the arbitration proceedings and allow the matter to proceed before the court. This discretion is not available to this Board which by virtue of section 112a has *exclusive* jurisdiction to hear and determine the dispute. While I am conscious of the practical problems which might arise in other situations, I am nevertheless convinced of the proper disposition of this case. I would hear and determine the grievance on the merits and would not defer to the "private" forum provided by the arbitration provisions of the parties' collective agreement.

76. In the result, a construction industry grievance filed in the summer of 1977 could not be addressed on the merits by the "private arbitrators" until at least a year later. The dispute went unresolved until well into the next "construction season".

77. It is not surprising, therefore, that (so far as I am aware) the issue addressed in *Spiers Brothers* has never surfaced before the Board again. Unions interested in expedition simply do not use the "private route". There are too many opportunities for delay. Indeed, since it took five months to get to the *first day* of hearing in the "private process" (to which the Board ultimately deferred), the situation in *Spiers Brothers* graphically illustrates why section 133 (then section 112a) was enacted, why it was a preferable alternative, and why, until quite recently, the Board has, *de facto*, been the exclusive forum for resolving construction industry grievances. The scenario in *Spiers Brothers* shows what the Legislature was trying to avoid.

78. However, leaving aside for now whether a party can *ever* "waive" access to section 133, and whether the Board can *ever* properly reject an otherwise timely reference, it seems to me that Kennedy and Don Valley have done nothing in this case that would preclude their proceeding to the Board. This is not a case like *Spiers Brothers* where the union and employer have overtly agreed to a hearing before a private panel. Nor is it a case where that panel has been constituted and begun to hear evidence. In fact, the grievance letter itself specifically mentions a reference to the Ontario Labour Relations Board - not the expedited arbitrator.

79. In the circumstances, therefore, Kennedy and Don Valley were quite understandably surprised to learn that the case was going before the expedited arbitrator, that a hearing date had already been set, and that there had been an *ex parte* production order. The employers certainly did not agree to that process. On the contrary. As soon as they became aware that the case was proceeding to adjudication, they invoked section 133.

80. It is true that the union had, on its own, referred the grievance to the expedited arbitrator, and, in consultation with him, had set a hearing date. It is also true that the arbitrator purported to make a production order - as he may well be able to do, *ex parte*, under the terms of the collective agreement or section 48(12)(b) of the *Labour Relations Act*. However, it is evident that the employers did not “attorn” to the arbitrator’s jurisdiction in any way; and, *in any case*, it seems to me that these events have to be weighed in light of the provisions of section 133 - particularly the opening words of the section that make access to the Board available “**DESPITE** the grievance **AND ARBITRATION** provisions in a collective agreement ...”. The reference to the “**arbitration provision**” of the collective agreement couldn’t be more specific.

81. The problem here, therefore, is the one posed in the minority judgement in *Spiers Brothers*:

- *IF*, under the statute, the referral to the Board is *timely* (i.e. “made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party”);
- *IF* the Board is then obliged to “appoint a date for and hold a hearing within 15 days after receipt of the referral”;
- *IF* the Board “has *exclusive jurisdiction* to hear and determine the difference or allegation raised in the grievance referred to it including any question of whether the matter is arbitrable”; **AND**
- *IF* the section 133 process operates “*despite the grievance and arbitration provisions in a collective agreement*”;

how is it that the Board can refuse to entertain that referral, because the union or employer prefers the negotiated process? Where does that *discretion* come from?

82. In particular, does the authority to determine whether a matter is “arbitrable” mean that the Board has a *discretion* to decide that the arbitration provisions in the collective agreement are more appropriate after all? And if there is such discretion, on what facts or principles should it be exercised? Does “arbitrability” depend (as suggested in *Spiers Brothers*) upon a “prediction” that the case will come before a private arbitrator as quickly as the Board would deal with it - a prediction that may or may not be realized in practice, and says nothing about when the arbitration process will *end* (something that is beyond the Board’s control, once it declines jurisdiction).

83. The problem with the *Spiers Brothers* approach is that it involves an interpretation of the word “arbitrable” that is both strained and inconsistent with the other statutory language that surrounds it.

84. One would not ordinarily think that the “arbitrability” of a grievance depends upon the identity of the arbitrator or whether s/he could schedule a hearing within a particular time frame. It seems odd to suggest that a case is “arbitrable” if it can be heard in 14 days and is not “arbitrable” if it takes 4 weeks - at least in the absence of collective agreement language to that effect. Yet that is a fact that was given some prominence in *Spiers Brothers*, leaving one with the impression that if the private arbitrator had not been available relatively soon, the Board would have held that the grievance was “arbitrable” after all.

85. In any event, it seems to me that, to the extent that the Board's ability to adjudicate *might* turn on steps already taken in the *grievance* or *arbitration* procedure, one also has to take into account the opening words of section 133: "*Despite the grievance and arbitration provisions in a collective agreement ...*". In my view, those words make it plain that arbitration *by the Board* does *NOT* depend upon "private" processes at all - be they steps in the *grievance procedure*, or steps in the prescribed arbitration process. The *exclusive* jurisdiction of the Board on receipt of the reference points in the same direction. And so does the fact that a party can come to the Board "*at any time*" after filing the grievance, and the Board is obliged to hold a hearing upon receipt of such referral.

86. In my view, these legislative prescriptions, read together, give a very clear answer to the "forum question" - however the Board ultimately looks at the case on the merits. The statute provides that a party may come to the Board, regardless of what the collective agreement says about the appropriate forum for resolving grievances.

87. Unlike, say, section 50 of the *Occupational Health and Safety Act* there is no formal election to which the parties are bound; and unlike section 96 of the *Labour Relations Act*, the Board has no express discretion to refuse to hear a matter or defer to arbitration. The Legislature could have provided for "election" or "discretion", but it did not. On the contrary. Section 133 gives the Board *exclusive* jurisdiction, once a timely reference is made. Not only is the language of section 133 quite clear in this regard, but the origins of the section underscore the legislative intent - which is to make the Board available regardless of what the parties may have privately negotiated, or what is required by section 48 of the Act.

88. In other words, attractive as it may be to say that "you shouldn't be able to ride two horses at once", or "having apparently made a choice, you should be stuck with it", or even "you should have to abide by what you bargained", section 133(1) makes it clear that a party may unilaterally elect to have a matter dealt with by the Board, *regardless* of the dispute resolution procedures in the collective agreement. To put the matter another way: on the question of forum, either party can elect to come to the Board, regardless of the other party's objection or preference to proceed under the terms of the collective agreement.

89. This is not to say that all of the provisions that one might find in a grievance-arbitration clause have been by-passed, or that one party or the other cannot point to such provisions (a time limit, say) in a proceeding before the Board. Such provisions may still bear upon the arbitrability of a grievance or the remedial options available to the Board. But on the question of *forum*, it seems to me that the statutory language is clear.

90. Finally, it is worth repeating that in both *Spiers Brothers* and the instant case (to change the metaphor a bit), the horse wasn't even out of the starting gate. The arbitrator had not begun to hear evidence, so as to become "seized" with the matter; and, in the present case, it cannot even be said that the employer had "agreed" to expedited arbitration then changed its mind. If anything, it was the union which changed directions. So this case is different from *Spiers Brothers* in any event.

91. Counsel for the union says that upon receipt of the grievance, the employer had the option (for a few days) to refer the matter to the Board for arbitration (what the union said that *it* was going to do), and, having not referred the matter to the Board at that point, it cannot be heard to complain later. Counsel asserts that the expedited arbitrator is a *permanent* umpire, who becomes seized of a case *immediately* upon referral to him, and, as here, can immediately make interim orders or unilaterally fix the hearing date. Counsel says that, given the way this agreement is structured, it does not require the employer's consent, nor can the employer complain if it did not refer the Ontario Labour Relations Board quickly enough. In counsel's submission, the way in which *this* arbitration process works, makes the situation the same as in *Spiers Brothers*, because, here, the choice of arbitrators has already been

prescribed in advance. There is a kind of “deemed agreement” from which individual employers must quickly extricate themselves, or they will be stuck with it. And here the employer wasn’t quick enough.

92. However, it seems to me that the foot race envisaged by counsel, is precisely what the Legislature was trying to avoid with the opening words of section 133. Those words, together with section 133(3) give *this Board exclusive* and, in my view, *pre-emptive* jurisdiction, when a party makes a timely referral; and the only statutory restriction on timeliness is that the grievance must be served first. I do not think the existence of a permanent umpire avoids the opening words of section 133. And, I repeat: this case does not involve a *joint referral* to the private process, so that it is distinguishable from *Spiers Brothers* in any event. Nor is this a situation where, having begun a hearing, a party has second thoughts and wants to change forums.

93. Here we have a controversy over the initial selection of forum, and, in my view, the opening words of section 133 clearly answer that question. They provide that *either party* may choose to come to the Ontario Labour Relations Board, regardless of whether the other party has elected to take the “private route”.

94. In my view, the employers’ reference is properly before the Board and the Board has “exclusive jurisdiction” to deal with it.

VIII - Some Final Observations

95. I recognize that what I have described as the “pre-emptive effect” of section 133 may inhibit the ability of parties to negotiate private systems that are *better* than the statutory model, that those private systems can relieve pressures on the public purse, and that they are in no way inconsistent with the policy thrust of section 133. I also recognize that, when section 133 was enacted in 1975, there was little prospect of a privately negotiated system that was as expeditious as the one in the agreement before me in this case. So, to this extent, it might be said that section 133 is obsolete (at least in some settings), and that the Board “should” have the general discretion to defer to private processes that are just as effective as the statutory alternative. Such discretion exists in Section 96 of the Act (the unfair labour practice provisions), and there is a good argument that it “should” exist in section 133 as well.

96. However, that is a matter which must be addressed by the Legislature. I do not think that such discretion can be found in section 133, as it is currently framed.

* * *

97. For the foregoing reasons, the union’s preliminary objection is dismissed, and the matter will be set down for further hearing on such day(s) as the Registrar may fix, or the parties may otherwise agree upon.

98. I will remain seized.

1367-96-FC International Union of Operating Engineers, Local 793, Applicant v. Maray Construction Ltd., Responding Party

Construction Industry - First Contract Arbitration - Board earlier directing that first collective agreement be settled by arbitration and parties requesting that Board arbitrate agreement - Parties resolving all issues except wages in second year of collective agreement - Union proposing 2% increase in second year and employer proposing no increase - Board reviewing relevant comparative collective agreements and finding union's proposal "not unreasonable" - Board awarding 2% increase effective January 1, 1998

BEFORE: *Inge M. Stamp*, Vice-Chair.

APPEARANCES: *Mike McCreary, Brian Madigan and Ken Lew* for the applicant; *Yvon Renaud and Ray Parsons* for the responding party.

DECISION OF THE BOARD; January 22, 1998

1. The Board (differently constituted) directed that a first collective agreement be settled by arbitration pursuant to the provisions of section 43 of the *Labour Relations Act, 1995*. The parties requested the Board arbitrate the settlement of the first collective agreement.
2. During the course of the hearing the parties were able to agree on all outstanding issues with the exception of whether there should be a rate increase in the second year of the collective agreement.
3. The parties agreed to and signed four identical collective agreements including attached letters of understanding effective January 1, 1997 until December 31, 1998 for Board Areas 21, 22, 23 and 24 covering that portion of the District of Algoma south of the 49th parallel of latitude, the District of Thunder Bay, the District of Rainy River and the District of Kenora including the Patricia portion.
4. The only outstanding issue between the parties is with respect to a wage increase in the second year of the collective agreement. The applicant proposed a 2% increase, the responding party proposed a 0 increase in the second year.
5. The parties had agreed to the base rates for the different classifications effective January 1, 1997. For example classification no. 1 effective January 1, 1997 is \$17.37. The applicant provided collective agreements in the road builders/sewer and watermain sectors in Northern Ontario for a number of companies. I will refer to the classification no. 1 base rate for comparison. This classification covers engineers operating backhoes, hydraulic excavators, clams, shovels, draglines, gradalls & similar equipment. The responding party's rate effective January 1, 1997 for classification no. 1 is \$17.37. Classification No. 1 in other collective agreements in the road builders/sewer and watermain sector in Northern Ontario in effect or effective January 1, 1997 are:

LeBrun Northern Contracting	\$17.92
E. & E. Seegmiller	\$17.35
Makkinga Equipment Rentals	\$18.00
Towland-Hewitson	\$17.60
Leo Alarie & Sons*	\$18.75

*(Classification 33 - operators of clams, cranes, including pile driving, cable shovels, draglines, party chief.)

6. A collective agreement was put before the Board for Tera North Construction which expired February 28, 1997. This collective agreement covered all of Ontario for all work except EPSCA, Pipeline and ICI sectors. The base rate in effect January 1, 1997 was \$17.00.

7. Base rates effective or in effect January 1, 1998 in similar agreements for classification no. 1 are:

LeBrun Northern Contracting	\$18.37
Makkinga Equipment Rentals	\$18.45
Towland-Hewitson	\$17.81

8. A 2% increase would bring the responding party's classification no. 1 rate of \$17.37 to \$17.72 (plus .35-). This rate is below rates in effect January 1998 in similar agreements in the area.

9. The responding party took the position that by agreeing to a substantial wage increase effective January 1, 1997 its labour cost increased significantly. The company operates essentially in the road building industry dependent on provincial contracts. The responding party does not expect any increase in its sales over the last year. The responding party referred the Board to a document produced by the Labour Management Services, Office of Collective Bargaining Information which showed 0 to 0.2 increases in the second and third quarter of 1996 in base wage rates in the construction industry. It is the responding party's submission that by agreeing to the January 1997 rate the employees received a 12% to 15% increase by becoming unionized.

10. The responding party asserts the 1997 rates are already above average. The three companies, LeBrun, Alaire and Makkinga are home-based companies. They are not required to mobilize and demobilize as frequently as the responding party. Maray Construction Ltd. evolved from a logging company into a construction company in 1992. Its head office and garage are in Dubreuilville. Because of the distances involved the responding party asserts it is at a real disadvantage in the industry. The above three companies are working at home base with available work year-round in the mines. The responding party has come up 12% to 15% which is a significant increase and should be left in place for the next two years.

11. The applicant submits the agreements provided to the Board cover road builders. The applicant disagrees that they are "home companies". The applicant further points to page 2 of the Collective Bargaining Settlements report indicating the average annual increases in the private sector were 1.9% in the second quarter 1996 and 2.5% in the third quarter 1996.

12. Having reviewed the base rates in the Road Builders' collective agreements in Northern Ontario which were put before me it is my view that a 2% increase is not unreasonable. The information with respect to the construction increases in the Labour Management Services report is too general to be of assistance. Page 7 of that report does not indicate what sector of the construction industry that it refers to.

13. A 2% increase effective January 1, 1998 will mean a base rate of \$17.72 for the responding party's classification no. 1 employees as compared to \$17.81 for Towland, \$18.45 for Makkinga and for LeBrun \$18.37. Compared to similar agreements in the industry a 2% increase is reasonable. I therefore award a 2% increase to the base rates effective January 1, 1998.

0083-97-R Labourers' International Union of North America, Local 183, Applicant v. **Mattamy Homes Limited** operating as Calben Developments Corp., The Mattamy Building Corp., Rockelm Building Corporation, Tweedsmuir Building Corporation, Tyana Developments Limited, Mattamy Properties Limited, Brooksmill Building Limited, Mattamy (Stonehaven) Limited, Mattamy (Eastoak) Limited, Steluk Building Corporation, The Wellesley Corporation, Mattamy (Westoak) Limited, Mattamy (Deerfield) Limited, Mattamy Homes Limited - Derry Road and Gilmac Partnership, Responding Party

Certification - Construction Industry - Labourers' union seeking to represent bargaining unit of construction labourers employed by builder of low-rise residential homes - Board determining that certain employees referred to as "servicemen" were performing bargaining unit work on date of application, and that ballots cast by them in representation vote should be counted

BEFORE: *Janice Johnston*, Vice-Chair.

APPEARANCES: *Mark Lewis* for the applicant; *Bob Wright* for the responding party.

DECISION OF THE BOARD; February 4, 1998

1. The style of cause is hereby amended to reflect that the correct name of the responding party is: "Mattamy Homes Limited operating as Calben Developments Corp., The Mattamy Building Corp., Rockelm Building Corporation, Tweedsmuir Building Corporation, Tyana Developments Limited, Mattamy Properties Limited, Brooksmill Building Limited, Mattamy (Stonehaven) Limited, Mattamy (Eastoak) Limited, Steluk Building Corporation, The Wellesley Corporation, Mattamy (Westoak) Limited, Mattamy (Deerfield) Limited". The parties were in dispute with regard to whether or not Mattamy Homes Limited - Derry Road and Gilmac Partnership should be added to the list of responding parties. After considering the evidence and the submissions of the parties I am of the view that these two entities should also form part of the name of the responding party in this case. Accordingly, the style of cause is also to be amended to include the names of these two additional companies. For ease of reference the responding party will henceforth be referred to simply as "Mattamy" or the "company".

2. This is an application for certification in which a representation vote was held on April 14, 1997 for the following bargaining unit:

all construction labourers in the employ of Mattamy Homes Limited, Mattamy Construction Limited, o/a Calben Developments Corp., o/a The Mattamy Building Corp., o/a Rockelm Building Corporation, o/a Tweedsmuir Building Corporation, o/a Tyana Developments Limited, o/a Stelum Building Corporation, o/a Mattamy Developments Limited, o/a Mattamy Properties Limited, o/a Brooksmill Building Limited, o/a Mattamy (Stonehaven) Limited, o/a Mattamy (Eastoak) Limited, o/a Steluk Building Corporation, o/a The Mattamy Development Corporation, o/a Clearbrook Building Corporation, o/a The Wellesley Corporation, o/a Steluk Developments Limited, o/a Mattamy (Westoak) Limited, o/a Edmayr Limited, o/a Mattamy (Deerfield) Limited, in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

The ballot box has been sealed pending the resolution of a number of challenges to the list.

3. At the commencement of the hearing there were two main issues in dispute between the parties. One of the issues concerns the eligibility of sixteen individuals to cast a ballot in the vote which was held. The second issue pertains to applications pursuant to section 11 of the Act which have been filed by both parties. At the outset of the hearing, the parties agreed to deal with the challenged individuals and then if necessary to deal with the section 11 applications. The hearing regarding the challenges lasted ten days and the Board heard from fourteen witnesses.

4. As noted, at the outset there were a total of sixteen individuals in dispute. They were challenged by the applicant on the basis that they were either not at work or were not performing bargaining unit work on April 7, 1997, the application date, or that they exercised managerial functions. By decision dated November 28, 1997, the Board concluded that five of the seven individuals challenged by the applicant as managerial did not perform managerial functions and should not therefore be excluded from the bargaining unit on that basis. The five were:

Mr. Phil Penney
Mr. Mike Haynes
Mr. Mike Boyle
Mr. Dave Grandy
Mr. William Kerkhof

The remaining two, Mr. Aubrey Nevan and Mr. Tony Fairbarn were agreed to as properly excluded from the bargaining unit by the employer.

5. During the course of the hearing, the company also agreed that Mr. Joe Brito, Mr. Mike Boyle, and Mr. Andre Beaudry should be removed from the list of sixteen challenged individuals. In other words, the company accepted the position of the trade union that these individuals were not appropriately included in the bargaining unit. Accordingly, any ballot cast by Mr. Aubrey Nevan, Mr. Troy Fairbarn, Mr. Joe Brito, Mr. Mike Boyle, or Mr. Andre Beaudry will not be counted and is to be destroyed.

6. The union withdrew its challenge to one of the individuals, Mr. Stan Rhynold and agreed that his ballot could be counted. Accordingly, the ballot of Mr. Stan Rhynold, if there is one, is to be counted.

7. Therefore by the end of the hearing, the Board was left with ten individuals still in dispute. These ten individuals are:

Mr. Joe Barbosa
Mr. Phil Penney
Mr. Jarosaw Wolejszo
Mr. Steve Lumbers
Mr. Gary Lumbers
Mr. Manuel Docouto
Mr. William Kerkhof
Mr. David Grandy
Mr. Lee Pollock
Mr. Mike Haynes

8. The issue remaining with regard to these individuals is whether or not they were at work on the application date and/or whether or not they were performing bargaining unit work on the date of application.

9. Both parties accepted that the test for determining which individuals were to be included on the list of eligible voters in an application for certification in the construction industry was as stated by

the Board in *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41. In that case the Board stated that in making the decision the Board would consider the following:

• • •

- (a) whether the person was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his/her time doing on the date of application or
- (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

10. Mattamy is a builder of low-rise residential homes in and around Toronto. On the date of application, it is not disputed that the employer had several active job sites both inside and outside of Board Area #8. The sites relevant to this decision are: West Oak, Avonlea, Deerfield, Sherwood Mills, Joshua Creek and the sales office located at Creditview and Derry Road.

11. The individuals in dispute break down into two broad categories. The first category is what was referred to by the parties as “servicemen” or “handymen”. The remaining individuals are challenged as generally not performing labourers’ work on the application date. On the date of application, the workday was nine hours long for everyone.

(i) The Servicemen Issue

a) The Facts

12. There are certain individuals who have been agreed to by the parties as servicemen. The issue is whether or not they are properly included in the bargaining unit, or in other words, is the work they perform bargaining unit work. The work they performed on the application date is either agreed to or essentially agreed to. The individuals in this category are Steve Lumber, Gary Lumber, Lee Pollock and Mike Haynes.

13. The parties agreed that the work performed by Lee Pollock should be described as follows:

Mr. Pollock worked at the Sherwood Mills site on April 7, 1997. On that day he performed minor repairs to a closet, door lock, (one and a half hours), installed window and hood fans and adjusted windows and doors (five and three quarter hours).

The parties agreed that the work performed by Mike Haynes should be described as follows:

Mr. Haynes worked at the Joshua Creek site on April 7, 1997. On that day he worked all day on trim repairs (four and a half hours) and cleanup (four and a half hours). The cleanup referred to was predominantly of the repairs he had been doing.

14. Mr. Gary Lumbers worked on the Avonlea site, which is located at Derry Road and Winston Churchill Boulevard, on the application date. Mr. Lumbers described himself as a handyman. Mr. Lumbers was paid \$16.85 an hour at the time of the application and reported to Mr. Aubrey Nevan, the service supervisor or manager. Mr. Lumbers described his duties generally as getting homes ready for pre-delivery inspections (PDIs). Mr. Lumbers described the PDI inspection as an inspection that occurs prior to the closing date in which the prospective owner of the house goes through the house with a representative of the company. Therefore, to ensure that the PDI goes smoothly it is necessary for a serviceman to thoroughly check the house prior to the PDI to ensure that everything is in as perfect a

condition as can be. Mr. Lumbers indicated that there is a list in existence that he referred to as as PDI check list, that indicates everything that should be checked room by room. He referred to this inspection as a "pre PDI". In performing a "pre PDI", Mr. Lumbers would basically go over a house from top to bottom. He would check on everything and ensure everything was functioning properly in the house. For example, he would check all windows, cupboards, water taps, carpet, and shelving to make sure that everything was in working order, had been completed and was in place. He would also do siliconing in the bath rooms, check all of the doors to ensure that they open and close smoothly, perform paint and drywall touch-ups, caulk around bath tubs, ensure light bulbs are working, install dryer vents and other heating vents, and installing things such as towel bars and toilet paper holders. The final part of this job was to ensure that everything in the house was spotless and clean. To perform these tasks, Mr. Lumbers carries in the trunk of his car a wide variety of tools which he makes use of on a regular basis.

15. On April 7, 1997, Mr. Lumbers worked in three different houses. In one of the houses he performed floor repairs; specifically, he repaired squeaks he had found in the floor. Mr. Lumbers worked with his brother Steve Lumbers in performing this work. In order to repair the squeaks, it was necessary for the two brothers to remove all of the wall-to-wall carpeting which had been laid and then to pull back the under-padding which had also been laid on the floors. After doing this they were able to access the floors and put in additional screws to eliminate the squeaks. After the floor had been repaired, they assisted a carpet specialist in re-laying the underpad and carpet. Mr. Lumbers estimated that they spent approximately three and a half hours performing this work as they essentially had to lift all of the carpet on the upstairs of the house to access the floor which needed repair work. After they completed the work they cleaned up.

16. Mr. Lumbers also spent approximately one hour on April 7th going through another house to ensure that it was thoroughly clean and that the floors in particular were clean as carpet was going to be laid the next day. After Mr. Lumbers cleaned the floors he went through the house ensuring that there were no squeaks, dents or marks in the floor. If he found any, he repaired them. Finally on April 7th Mr. Lumbers spent approximately four and a half hours doing a pre-PDI inspection on a house. He described what he did in that house as follows: repairing windows on the upstairs floor, which consisted of repairing three windowsills that had cracked; siliconing the bath tubs and the jacuzzi; putting in the floor registers; inserting light bulbs; dapping of frames which consists of siliconing the base boards where the frames met the tiles; adjusting a couple of cupboards; some drywalling and some paint touch-ups and finally a general clean-up of the whole house.

17. Mr. Steve Lumbers testified that he too was a handyman and that he performed a wide variety of duties from repairs to clean-up to light duties. Mr. Steve Lumbers makes \$16.50 an hour and also reports to Mr. Aubrey Nevan. Mr. Steve Lumbers described the work he performs generally as wall repairs, floor repairs, wood-working, or drywall touch-ups. On April 7th, Mr. Steve Lumbers testified that in addition to spending approximately three to three and a half hours working with his brother on the floor repairs described above, he also spent approximately three hours repairing a defective wall stud in a home which was occupied by the owner. Mr. Steve Lumbers indicated that repairing the stud involved: initially locating where it was; removing the drywall that concealed it; removing the defective stud; going to the construction area and finding a replacement stud and drywall; returning back to the house; inserting the new stud and replacing the drywall; taping the drywall; putting on a coat of drywall mud and then cleaning up after. Mr. Lumbers indicated that it took him approximately three hours from start to finish. He broke the time down as approximately one half hour to remove the stud and drywall, one hour to find the replacement pieces, one hour to insert the new stud and drywall and approximately one half hour of clean-up.

18. On Oct./Apr. 7th, Mr. Steve Lumbers also spent approximately two hours conducting what he referred to as a house "prepping". It appears that this is his way of describing what Mr. Gary

Lumbers referred to as a “pre-PDI” inspection. The work he performed in the house consisted of cleaning and checking the windows; checking the trim work; caulking the baseboards; cleaning the cupboards; and essentially ensuring that everything looked ready for the prospective home owners. He also checked to ensure that all of the sinks and taps were functioning properly. He cleaned the garage and swept and cleaned the floors. Most of the work he performed in this two hour period consisted of inspecting and cleaning the house.

b) Argument

19. Counsel for Mattamy argued that the work of the servicemen should be considered to be bargaining unit work. He took the position that the labourers perform a broad range of tasks and that there is a great deal of overlap between work performed by the construction labourers and other trades. The Board has never defined the labourers as a “craft” union and as such they do not have a clear, core jurisdiction over certain work. In his view, work traditionally described as labourers’ work is wide enough to encompass the type of tasks performed by the servicemen employed by Mattamy. After reviewing the work performed by the servicemen, counsel for Mattamy argued that all of this general repair work and clean-up work is properly considered to be work of construction labourers.

20. In support of his argument counsel referred the Board to *P.H.I. International Inc.*, [1980] OLRB Rep. Dec. 1789. The Board in that case was dealing with the status of several individuals, two of whom appear to have performed duties similar to those performed by Gary and Steve Lumbers. The Board in the *PHI* case concluded that work such as cleaning garages and basements of houses recently built, cleaning floors prior to the laying of carpet, doing minor repair work on cupboards, lighting fixtures, an entrance way, steps, tiles, locks, windows, and fixing minor cracks in the walls, could be properly characterized as construction labourers’ work. Counsel for Mattamy urged the Board to come to a similar conclusion in this case. In support of his argument, counsel for Mattamy also referred the Board to *Vibration Assessment Limited*, [1989] OLRB Rep. Feb. 223, *Runnymede Development Corporation Limited*, [1988] OLRB Rep. Sept. 976 and sought to distinguish *Nu-West Development Corporation Limited*, [1983] OLRB Rep. May 692.

21. Counsel on behalf of the trade union argued that servicemen should not be included in the bargaining unit. He argued that the work generally performed by the servicemen was different from that performed by the other labourers. He pointed out that this company had organized the service function as a separate function under separate management. He noted that the work performed by the servicemen on the application date was certainly construction work but he was not prepared to concede that on every day all of the servicemen spent the majority of the day performing construction work. Counsel pointed out that servicemen are common in the residential construction sector and that they perform the work of a number of different trades. He conceded that certainly a portion of the work performed by the Lumber brothers on the application date was construction labourers’ work. Work such as general clean-up, hand digging or concrete work has traditionally been found to be construction labourers’ work. But in his view, the two brothers also performed work which is traditionally performed by frame carpenters, trim carpenters, tile and terrazzo workers, electricians and masons.

22. While agreeing with counsel for the employer that the Board had not found that construction labourers were a craft union, counsel pointed out that the Board at a minimum has limited the work of construction labourers to ensure that they are not performing work which has traditionally been found to be the core work of other trades. The Board consistently has found that there are certain core functions pertaining to each of the trades and crafts and that the core functions of the other trades cannot be the work of the labourers union. In his view, in this case, the work performed by the servicemen clearly falls within the core functions of a variety of trades and crafts.

23. Counsel reviewed some of the work performed by Mr. Steve Lumbers. In particular he pointed to the work that Mr. Lumbers did when he removed a defective stud, removed drywall, replaced the stud, replaced the drywall and painted the drywall. Counsel argued that there can be no doubt that this work is carpenters' work and drywallers' work, not the work of construction labourers. If it was not labourers' work when it was done initially, counsel questioned how it could ever be labourers' work when it was being performed for a second time.

24. While conceding that the case before the Board was not a jurisdictional dispute, counsel for the employer nevertheless argued that it was necessary for the Board to determine whether the work performed by the servicemen was in fact work which fell within the bargaining unit. He argued that the work was not bargaining unit work, as much of what was done on a daily basis and in particular on the application date by the various servicemen, is work which clearly falls within the core jurisdiction of other trades.

25. Counsel asserted that the *PHI International Inc.* case was not helpful as there was no analysis with regard to the core jurisdiction of the other trades. Although the case found that repair work was construction labourers' work it did not address the arguments being made in this case. In addition he pointed out that the *PHI International Inc.*, *supra* case was decided prior to *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41. In his view the *Seegmiller* case initiated a new test for the Board in which the Board primarily looked at work performed on the application date as opposed to work generally performed. In his argument counsel also referred the Board to *Ellis Don Limited*, [1994] OLRB Rep. Sept. 1222, *J.R. Knowle Plastering Limited*, [1984] OLRB Re. July 928, *Ming Sun Holdings Inc.*, [1987] OLRB Rep. Dec. 1585, and *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220.

c) Decision

26. I agree with counsel for the trade union that the servicemen employed by Mattamy viewed themselves and were viewed by others as different from the general construction labourers. They had a separate line of supervision in that Mr. Aubrey Nevan was in charge of the servicemen employed on different construction sites. Often but not always, the servicemen had the use of a company vehicle. Regardless of whether or not a particular serviceman used a company vehicle or his own vehicle, the vehicle was loaded with a variety of tools and materials. Clearly Mattamy has a cadre of servicemen who perform work in the various homes both before and after the sale of the home. However, this conclusion does not really assist me in the question I must answer, which is whether or not "service" work is bargaining unit work, or in other words, construction labourers' work.

27. Simply because the servicemen are treated differently than the other construction labourers employed by Mattamy and generally perform more inspection and repair work than the other labourers, does not mean that the work they perform is not construction labourers' work. "Service" work, in the context of this case, could be labourers' work, or it could be that "service" work is not labourers' work. Counsel for the union conceded that the service work was construction work but argued that it was not labourers' work.

28. In *PHI International Inc.*, *supra*, the Board came to the conclusion that work virtually identical to the work performed in this case could be characterized as construction labourers' work. After the reviewing the various jobs which had been performed by the two individuals in question, the Board stated:

... it is clear that the functions of both of these employees were closely connected with the construction project, and can either be characterized as part of the finishing or decorating phase, or alternatively, as the repair of equipment or fixtures which were defective or improperly installed. In

either case, we are satisfied that the employees functions are properly characterized as construction labourers work.

As noted by counsel for the trade union no reasons were provided for this conclusion. Nevertheless, the *PHI International Inc.*, *supra*, does stand for the proposition that the type of work which has been characterized by the parties in the case before me as “service” work is to be characterized as construction labourers’ work.

29. Counsel for the trade union argued that if the type of work being performed by the servicemen was the work of a variety of other trades the first time it was performed, then it could not be the work of construction labourers when it was being performed the second time by the servicemen. In other words counsel argued that if painting a wall was painters work the first time, then any repair to that painting job being performed by the servicemen must be painters’ work as well.

30. While at first glance this argument sounds persuasive, the difficulty with it lies in the practical problems its application could create. Surely it does not make any labour relations sense to require that all repair work done in the context of this case must belong to the original trade who performed the work being repaired. This would mean that a painter would have to be called back to put a tiny dab of paint on a scratch or mark on a wall, or that a carpenter would have to be called in to hammer in a nail which was a bit loose. Clearly in the course of a day a serviceman employed by Mattamy could perform the work normally performed by a painter, carpenter, electrician, frame carpenter, plumber, drywaller and so on. Being a serviceman employed by this employer, which performs work in the residential sector, involves the use of a wide variety of tools and the performance of a wide variety of tasks which could fall within the ambit of the work of a particular trade.

31. Therefore, while in strictly technical, legal terms counsel for the trade union may be correct, in the context of this case, to apply it would result in a totally unworkable and impractical situation. In the past the Board has observed that there can be overlap between the work of one trade and that of another. Although dealing with the issue in a different context, in *Runnymede Development Corporation Limited*, *supra*, the Board stated:

11. It is evident that all five employees in dispute were employed as “servicemen” and that in the course of their employment they did the work of several trades, including labourers’ work and carpenters’ work. In its October 6, 1987 decision, the Board commented, at paragraph 23, on the distinction between the labourers’ work and carpenters’ work:

23. Some of the work covered by the Housing Bureau Agreement is work which can be, and is, performed by either construction labourers, or by carpenters or carpenters’ apprentices; that is, it is work over which other trades assert jurisdiction. In other words, some of the work covered by the Housing Bureau Agreement can be done by either members of the United Brotherhood of Carpenters and Joiners of America, (the “Carpenters”) or by members of the Labourers’ International Union of North America (the “Labourers”). It is both “labourers work” and “carpenters work”. In such circumstances, the work being performed cannot be determinative of the trade of the person performing it; that is, it is not work belonging to the Labourers just because a labourer is doing it, nor is it work belonging to the Carpenters just because a carpenter or carpenters’ apprentice is doing it. An employee is not a construction labourer merely because s/he is doing work that a construction labourer sometimes does if carpenters also perform that work as part of their trade. consequently, the fact that members of the intervener sometimes perform work (for the respondent) that carpenters also do not mean that the intervener represents all carpenters employed by the respondent.

How does one determine whether an employee who is working in one trade or another in circumstances where the two trade jurisdictions overlap, as do those of construction labourer and carpenter? It is no easy matter to do so particularly when the work being performed comes within the overlap.

However, the determination must be made and can only be made by considering the evidence as a whole and bringing to bear the Board's own expertise.

32. Obviously the work performed by the servicemen in this case could be work which is normally performed by a number of other trades. However, the cleaning work performed by the servicemen is clearly construction labourers' work and makes up a significant portion of the work of a servicemen. On balance I am satisfied that it makes labour relations sense to conclude that the work of a construction labourer is broad enough to include the type of work regularly performed by the servicemen. Therefore, the "service" work is construction labourers' work and bargaining unit work.

33. It is appropriate to include the servicemen in the labourers bargaining unit for another reason as well. Counsel for the union argued that there should not be a separate bargaining unit made up solely of servicemen. If that is so, and the servicemen do not belong in the labourers bargaining unit then where do they belong? In the case before me, although the work performed by the servicemen is work which may be performed by a wide variety of other trades, it appears that it would be somewhat unusual for a serviceman to spend an entire day performing work which would normally performed by only one trade. Generally the work performed by the servicemen on any given day would be the type of work performed by several different trades. Therefore, if the test as articulated in the *Seegmiller* case is to look at whether or not a particular individual spent the majority of his day performing bargaining unit work, it is quite possible that the servicemen could never fall into any particular bargaining unit if they do not spend the majority of the day performing work normally associated with one trade. It could mean that some of the servicemen would never be placed in any bargaining unit even though the work they perform is construction work which is covered by the Act.

34. Accordingly, in the circumstances of this case, it makes no sense to exclude the servicemen from the bargaining unit. While some of the work they perform could result in them being placed in a bargaining unit of another construction trade union, they also can fit within a labourers' bargaining unit. Given the nature of the tasks performed by the servicemen on the date of application, I am of the view that it is appropriate to place them in the labourers bargaining unit. Therefore the four agreed upon servicemen, Mr. Lee Pollock, Mr. Mike Haynes, Mr. Gary Lumbers and Mr. Steve Lumbers are all employees in the bargaining unit.

35. If any or all of these four individuals cast a ballot in the representation vote, that ballot is to be counted.

(ii) The remaining challenges to the list

a) Mr. Manuel Docouto

36. Mr. Manuel Docouto's duties generally included repairing drywall, fixing breakwalls, fixing floors which were squeaky, fixing the slabs which make up the walkway to a house and cleaning floors. On some days his duties included fixing doors and other things. As he put it "super says go fix and I go fix". Mr. Docouto's evidence with regard to the tasks he performed on April 7, 1997, was somewhat confused. In examination-in-chief he indicated that he spent approximately two hours in a house doing minor repairs to the drywall and a floor, approximately one hour adjusting patio slabs and approximately six hours cleaning up debris. Mr. Docouto also indicated that he spent some time cleaning the bricks of a house. In cross-examination, Mr. Docouto became quite mixed up concerning what duties he performed on April 7th, the order in which he performed them, and the amount of time he spent performing each task.

37. Although his evidence was somewhat jumbled, I am satisfied that the duties he performed on April 7th could be characterized as construction labourers' or servicemen's work. In fact in final

submissions, counsel for the trade union characterized him as a serviceman. Accordingly, as he is a construction labourer, he is to be included in the bargaining unit. Any ballot cast by Mr. Docouto shall be counted.

b) Mr. William Kerkhof

38. The facts concerning the work performed by Mr. William Kerkhof are essentially not in dispute. What is in dispute, is whether or not the work he performed on the application date is construction labourers' work. Mr. Kerkhof described himself as a working foreman who performed service related work. On the application date, it is not disputed that he spent approximately nine hours inspecting and repairing the water boxes located in front of homes which had been sold by Mattamy and were occupied.

39. Mr. Kerkhof indicated that a water box is a valve which is located approximately four feet underground at the front of a residential home. In order to be functioning properly, it must be possible to close the valve easily. Sometimes the pipe leading to the valve has been bent by heavy machinery going over it and must be replaced. Therefore in checking the water boxes, his first step was to go up to the house to see if the home owner was present. If the home owner was present Mr. Kerkhof advised him/her that he was there to check the water box. After receiving permission from the home owner, he would locate the water box, clear the dirt away which occasionally involved digging up the water box using a pick and hand shovel and then inspect the water box. Occasionally the pipe or the lid needed to be replaced, or the pipe had sunk into the ground so deeply that it was necessary to put an extension pipe on it. Once Mr. Kerkhof determined which water boxes needed to be repaired, he then spent approximately one hour organizing the materials he would need to repair the water boxes and ordering those materials that he did not have. After that he spent about three hours repairing the water boxes.

40. In final argument counsel for the employer stated that in applying the *Seegmiller* test, the Board should conclude that generally on days other than the date of application Mr. Kerkhof was a working foreman who performed service/handyman functions. Counsel argued that on April 7th, Mr. Kerkhof was employed as a serviceman.

41. Counsel for the trade union took the position that Mr. Kerkhof should not be included in the bargaining unit as on the date of application he did not spend the majority of his day doing construction work. Counsel argued that the five hours he spent performing checks on water boxes in houses where the construction work had been completed was not construction work. It was not disputed that construction had been completed on the homes, as that was why the checks were being performed at this time when there was no chance of any further damage to the water boxes by heavy machinery. The trade union argued that although there is no doubt that fixing the water box is construction work, as it is repair work, performing the test itself on the completed system is not construction work. Accordingly, on the application date, some of the work performed by Mr. Kerkhof was construction work, namely the repair work, but as the majority of his day was not spent doing construction work he should be excluded from the bargaining unit.

42. I am satisfied that Mr. Kerkhof spent the majority of his time performing the work of a construction labourer on the application date. It is not appropriate to compartmentalize the work on the water boxes in the fashion suggested by counsel for the union. Checking and repairing water boxes can be and is construction labourers' work. Accordingly any ballot cast by Mr. Kerkhof is to be counted.

c) David Grandy

43. It was not disputed that Mr. David Grandy is a working foreman. On the application date he started the day by using a rubber tire backhoe to transport propane bottles and heaters to various houses.

He would then unload them, take them into the basement or where a trade might be working, set them up and turn the heat on. If a propane heater was already located in the house, after attaching a new propane bottle he would take away the empty propane bottle(s). Mr. Grandy spent approximately two hours performing this function. Mr. Grandy spent approximately one hour at the end of the day using the backhoe to scrape the mud and other debris which had been tracked onto the roadway by the heavy trucks. In addition, on the application date Mr. Grandy spent approximately three to four hours repairing water boxes. He indicated that he would test the water box to see if it was functioning properly and that if it was not, then he would dig it up and repair it or replace it. Of the three to four hours Mr. Grandy spent working on the water boxes, he indicated that testing the water boxes took up approximately five percent of the time, digging it up took up approximately fifty percent of the time and then repairing it took up approximately forty-five percent of the time. He dug up the water boxes using either the backhoe or a hand shovel.

44. In cross-examination, Mr. Grandy agreed with counsel for the trade union that he would normally spend approximately one to two hours performing administrative tasks or supervising the work of the construction labourers over the course of a day. He agreed that on April 7th he would have done so. He also agreed with counsel for the union's estimate that he spent more or less half of the remaining day operating the backhoe. He operated the backhoe as part of repairing the water boxes, delivering the propane and cleaning the road.

45. Counsel for Mattamy argued that although the operation of a backhoe could be operating engineers' work, it could also be labourers' work. He pointed to the evidence of the union's business representative that when the business representatives were looking for labourers on a given site one of the things they looked for was the backhoe, as the backhoe is commonly operated by labourers. Counsel for the employer also argued that as the operating engineers do not claim the operation of a rubber tire backhoe in residential construction as their work, it could be considered to be construction labourers' work.

46. Counsel for the trade union pointed out that the backhoe is not mini-equipment but a large piece of machinery. In his view there was absolutely no doubt that the backhoe utilized in this case falls within the jurisdiction of the operating engineers. Although he conceded that labourers' use and work on backhoes, it does not mean that it is labourers' work. He stressed that what was critical was what work was being performed on the backhoe. For example, if the backhoe was being used to pile garbage and drive it to the dumpster, it could be labourers' work. However, if the backhoe is being used to dig holes and scrape roads, then you are performing the work of a backhoe driver and should not be included in the labourers bargaining unit. Counsel asserted that moving propane tanks around using a backhoe is also working as a backhoe operator and as such is not labourers' work.

47. Mr. Grandy conceded that he spent at least three and a half to four hours of his nine hour day operating the backhoe. He spent one to two hours working on administrative or supervisory duties and approximately three and a half to four hours of time performing general labourers' duties.

48. While clearly the operation of the backhoe could be the work of operating engineers, I am satisfied that in the context of this case it can also be construction labourers' work. Accordingly any ballot cast by Mr. Grandy is to be counted.

d) Mr. Jarosaw Wolejszo, Mr. Phil Penney and Mr. Joe Barbosa

49. After carefully reviewing the evidence of these three individuals I am satisfied that they were not performing bargaining unit work on the application date. While I do not think these three men intentionally misled the Board, the evidence they did give was either uncertain or unclear concerning what duties they performed on the application date. The evidence of the witnesses called by the trade

union concerning what they observed these three men doing, or not doing, on the application date, is to be preferred. As I am not satisfied that they spent the majority of time on the application date performing bargaining unit work, these three men will not be included on the list of eligible voters. Therefore any ballot cast by one of these three men is to be destroyed and not counted.

50. This matter is hereby referred to the Manager of Field Services to arrange for the counting of the segregated ballots in accordance with this decision. To summarize, the ballots cast by the following individuals are to be counted:

Mr. Stan Rhynold
Mr. Lee Pollock
Mr. Mike Haynes
Mr. Steve Lumbers
Mr. Gary Lumbers
Mr. Manuel Docouto
Mr. David Grandy
Mr. William Kerkhof

The ballots cast by the following individuals are not to be counted:

Mr. Aubrey Nevan
Mr. Tony Fairbairn
Mr. Joe Brito
Mr. Mike Boyle
Mr. Andre Beaudry
Mr. Jarosaw Wolejszo
Mr. Phil Penney
Mr. Joe Barbosa

51. Although I am not seized with regards to the section 11 application, if it is possible to schedule this issue in a timely fashion before me, the Registrar will do so. If not, the section 11 issue will be dealt with by another panel of the Board.

3999-96-FC; 0052-97-R Canadian Union of Public Employees, and its Local 3875, Applicant v. Native Child and Family Services of Toronto, Responding Party; Peter Menzies, Applicant v. Canadian Union of Public Employees, Responding Party v. Native Child and Family Services of Toronto, Intervenor

Collective Agreement - First Contract Arbitration - Practice and Procedure - Representation Vote - Termination - Group of employees applying to terminate union's bargaining rights after union filing first contract application, but before hearing into first contract application commencing - Board directing representation vote in termination application, but ordering that ballot box remain sealed - At commencement of hearing into first contract application held after that vote, employer signing union's proposed collective agreement and asking that first contract application be terminated - Employees ratifying proposed collective agreement - Board concluding that parties had reached collective agreement, that first contract application moot, and that no purpose could be served by holding further hearings into first contract application - Board exercising its discretion under section 111(5) of the Act to direct new representation vote in connection with termination application

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

DECISION OF VICE-CHAIR GAIL MISRA AND BOARD MEMBER J. A. RONSON; February 9, 1998

1. Board File No. 3999-96-FC is an application filed with the Board on February 27, 1997 by the Canadian Union of Public Employees and its Local 3875 (the “union”) for a direction that a first collective agreement be settled by arbitration, pursuant to section 43 of the *Labour Relations Act, 1995*. Board File No. 0052-97-R is a timely application for termination of bargaining rights filed by Mr. Menzies on April 4, 1997, pursuant to section 63 of the Act.

2. On July 29, 1997, the Board issued a decision with respect to a number of matters which had arisen in this case. The question which remained outstanding before the Board was the status of the first contract application and of the termination application. For reasons explained in that decision, prior to ruling on this remaining issue the Board gave the parties an opportunity to make submissions with respect to how the Board should decide this question. We have now reviewed all of the parties’ submissions, and, based upon both the oral submissions made at the hearing, and the subsequent written ones, are in a position to render a decision.

3. Given the nature of the sequence of events in this case, the union submits that the first contract application should proceed, even if there is now technically a collective agreement in place. It argues that the collective agreement is tainted as it is the “fruit of bargaining in bad faith and represents both an abuse of process and a fraud on the Board”. There are no pleadings in support of this position. The union seeks to have the Board hold a hearing to determine whether Native Child and Family Services of Toronto (the “employer”), through its conduct in purporting to enter into the collective agreement, has violated the Act.

4. The objecting employees submit that since a proposed collective agreement was reached, and subsequently ratified by the members of the bargaining unit, the employer and the union have now effected a first collective agreement. Therefore, the Board should dismiss the first contract application on the grounds that it is now moot, and that it would serve no labour relations purpose to inquire into it any further as there could be no remedial relief ordered. The objecting employees submit that the termination application, which the Board has already found to be timely, may then proceed. It is suggested that the ballots cast in the vote held on April 15, 1997 should be counted.

5. The employer, adopting the argument made by the objecting employees, submits that the first contract proceeding should be considered terminated, and that there is now no impediment to the counting of the ballots cast in the termination application.

DECISION

6. The issue which arose in this case was one of first impression for the Board in that an employer had not previously agreed to sign a proposed collective agreement tendered by a union, as part of the first contract direction application, when there was also an outstanding termination application. However, in the intervening time since this case began, a similar case was heard and decided by another panel of the Board. The Board in that case reached a different conclusion. In the course of this decision reference will be made to *Ingersoll Plastics Inc.*, (Board File No. 1838-96-FC, December 10, 1997, as yet unreported), [now reported at [1997] OLRB Rep. Nov./Dec. 996].

7. In reaching its decision, the Board has considered all of the submissions of the parties, and has had regard to the policy implications of an employer accepting a union’s first agreement proposal for a collective agreement after a termination application has been filed.

8. As stated in the Board's decision of July 29, 1997, the chronology of events in this case is as follows. The union was certified to represent the employees of the employer on October 23, 1995. The parties bargained for a first collective agreement until the union filed its application for a first contract direction on February 27, 1997. In accordance with Rule 67(j) of the Board's Rules of Procedure, with its application the union submitted a draft collective agreement which it was prepared to sign. On March 13 and again on April 4, 1997, termination applications were filed. The first termination application was withdrawn on April 11, 1997. On April 11, 1997, after both termination applications had been filed, the union submitted a revised proposed collective agreement, again in accordance with Rule 67(j), which it was prepared to sign. On April 24th, at the hearing of this matter, the employer agreed to accept that proposal and signed it back to the union. The Board found that there was a proposed collective agreement between the parties, and subsequently a ratification vote was held of the membership. On April 28, 1997, the bargaining unit members voted to ratify the collective agreement.

9. We have already found that on April 24, 1997, the union's proposed collective agreement, tendered as part of its first contract application, was on the table and capable of being accepted by the employer, and that there was no impediment to the employer's acceptance of the union's proposed collective agreement. The Board does not intend to once again revisit this issue, which was argued before us on April 24th and again in the reconsideration application. There must be some finality to matters which are heard and decided before the Board, and parties should be able to expect that once a matter has been heard, decided, and reconsidered, that the matter is considered at an end.

10. In the circumstances of this case, and for the reasons which follow, the majority is of the view that the parties have reached a collective agreement, that the first contract direction application is consequently now moot, and that no purpose can be served by holding further hearings into this application.

11. We start from the proposition, recognized in the Board's jurisprudence, that the process of collective bargaining is one which is to be encouraged, as a negotiated solution is generally going to be the most acceptable to the parties. In *Nepean Roof Truss Ltd.*, [1986] OLRB Rep. July 1005, the Board outlined the purpose of the first contract provisions of the Act as follows:

16. It is clear from these provisions that the legislature has acknowledged the significance to the collective bargaining relationship of the first contract, and has given statutory recognition to the potential difficulties that may be encountered in achieving it. This remedy does not supplant the primacy of the free bargaining process; rather, it recognizes that negotiation of the first agreement may sometimes be thwarted by unjustified intransigence. Although this is remedial legislation and should be given a liberal construction and interpretation, the scheme of section [43] does not envision the automatically imposed settlement of a first collective agreement in all cases where the parties are unable to negotiate one. What it provides is access to this remedy where certain conditions precedent have been met. These conditions are enumerated in subsections (a) - (d) of section [43(2)].

12. In this case, these parties had been negotiating over a period of about 16 months before the union filed its first contract direction application. It would be in that context that the parties, in accordance with the Board's rules, submitted the proposed collective agreements which each was prepared to sign. As the Board noted in its earlier decision, the Board requires that the parties turn their attention to what they want in a collective agreement in the expectation that each party will carefully consider its position. Having an opposing party's proposed collective agreement before one allows a party an opportunity to evaluate it with a view to whether one can live with it, and thereby reach a collective agreement without resort to litigation. That is notionally what occurred here when the employer accepted the union's proposed collective agreement prior to the commencement of the substantive portion of the hearing.

13. What the Board has before it is a collective agreement submitted by the union which it was by definition prepared to sign, which the employer then also agreed to sign, and did sign. The membership of the union voted on the proposed agreement, and ratified it. In these circumstances we conclude that the parties have reached a collective agreement.

14. It is not for the Board to infer motive in the absence of any pleadings or evidence suggesting such. The Board is not blind to the reality that parties to litigation act in their own best interest, and in doing so, may employ strategies to achieve their own ends. That strategizing is in fact necessary in the adversarial system. It is our view that in this case the employer decided to take the chance of accepting the union's proposal, and subsequently the employees voted to accept the proposed collective agreement. It may be that by adopting the strategy that it did the employer has caused the termination application to become the live issue. However, that in and of itself cannot be a legitimate reason for the Board to ignore the acceptance and ratification of the collective agreement, and to go forward and hear the first contract direction application. The Board ought not to be basing its decision on the strategies employed by the parties. We are of the view that there would have to be a more compelling reason, perhaps outlined in pleadings, for the Board to embark on such a course.

15. We understand that as a consequence of our decision there may be a concern that by agreeing to an adjournment, whether to continue to bargain, or to accommodate an employer, a trade union may find itself prejudiced by the filing of a timely termination application. However, any applicant can choose when it wishes to file an application under section 43, so that it is for that party to decide when it is or is not in its interest to consent to adjournments. The Board has consistently scheduled these matters for hearing within 30 days of the application date, and has attempted to accommodate in its scheduling the need to complete this type of case expeditiously. Notwithstanding the legislated and administrative priority given to section 43 cases, it was the parties which asked to adjourn dates until one or the other believed it should proceed.

16. There may also be a concern about the implications of compliance with Rule 67. Since this issue had not arisen previously, there had been no reason for the Board to opine on the status of a party's proposed collective agreement filed with a section 43 application or response. In many cases the presence of the proposed collective agreements of the parties did lead to negotiated settlements being reached. However, the Board's rule is clear: An application for first contract arbitration under section 43 must also include a copy of a proposed collective agreement which the applicant *is prepared to sign*. We do not think there is anything misleading or unclear about the rule. It is always open to a party to seek to amend or supplement its pleadings in light of later developments in a case. Hence, if a party believes that there has been some material change in circumstances, such as the filing of a termination application or some conduct on the part of the other party, it may make submissions to the Board about how it would like to address the new development, and it may wish to amend its proposed collective agreement.

17. In the case before us, the union did in fact amend its proposed collective agreement two weeks before the commencement of the hearing. This was long after the employer's response and its proposed collective agreement had been filed, and was after both termination applications had been filed. It can hardly be suggested that the proposal had been extinguished by the passage of time, and there was no other intervening event before the beginning of the hearing.

18. It is noteworthy that in its response to the termination application, the union has not alleged that the employer initiated the termination application, or engaged in threats, coercion, or intimidation in connection with that application, contrary to section 63(16) of the Act.

19. As was noted earlier, another panel of the Board has very recently issued a decision in a case which raised a similar issue to the one before us. In *Ingersoll Plastics Inc.*, cited above, the

majority of the Board decided that despite the employer's acceptance of the union's proposed collective agreement, it would hear the entire section 43 application. The facts of that case are distinguishable from the facts before us. There, the union's proposed collective agreement had been outstanding for almost five months, and the termination application had been filed after the union had filed its amended proposed collective agreement. Furthermore, in that case the employer did not sign the union's proposed collective agreement, but rather indicated that it would only do so if it had an assurance that the Board would dismiss the first contract direction application.

20. The Board had requested that the parties make submissions on the effective date of the collective agreement. However, none of the parties addressed this matter in their submissions so it would seem not to be an issue between the parties.

21. We turn now to a consideration of the termination application. There has been considerable upheaval in this bargaining unit since it was certified more than two years ago, on October 23, 1995. At the time of the filing of the first contract application in February 1997, the bargaining unit members had been without a collective agreement for 16 months. First one and then a second termination application was filed in March and April, 1997. A vote was held and not counted in April, 1997. A further vote was held for the ratification of the collective agreement in late April, 1997.

22. Pursuant to section 111(5) of the Act, the Board has the power to order another vote. The section states:

111. (5) Where the Board determines that a representation vote is to be taken amongst the employees in a bargaining unit or voting constituency, the Board may hold the additional representation votes as it considers necessary to determine the true wishes of the employees.

23. It is therefore open to the Board to order another representation vote in the termination application should it deem it necessary to do so. In the circumstances of this case we are of the view that another vote should be held to determine whether the employees of the bargaining unit wish to continue to be represented by the union. At the time that the original termination vote was held these employees had been certified, but without a collective agreement, for one and a half years. Since that time their employer has reached a collective agreement with their bargaining agent, and they have ratified that collective agreement. Given the passage of time in this case, these employees have now had an opportunity to live with the conditions of the new collective agreement, and we believe will be in a better position to gauge their commitment, or lack thereof, to having a continuing relationship with this trade union. Therefore, in the exercise of the Board's discretion, we order that a new representation vote be conducted to determine the true wishes of the employees of this bargaining unit.

24. The Board directs that a representation vote be taken of the employees of Native Child and Family Services of Toronto employed in the following bargaining unit:

all employees of Native Child and Family Services of Toronto, save and except Program Coordinators and Supervisors and persons above the rank of Program Coordinator and Supervisor.

25. All those employed in that bargaining unit on April 4, 1997, the application filing date, and who are still employed, will be eligible to vote. The vote will be held on February 17, 1998. Other vote arrangements will be as determined by the Registrar and set out on the attached Notice of Vote.

26. Voters will be asked to indicate whether or not they wish to be represented by the responding party in their employment relations with Native Child and Family Services of Toronto.

27. The employer is directed to post copies of this decision and of the "Notice of Vote" adjacent to the "Notice to Employees of Application for Termination of Bargaining Rights". These copies must remain posted for 30 days.

28. Any party or person who wishes to make representations to the Board about any issue remaining in dispute which relates to the application for termination of bargaining rights, must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board within seven days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

29. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER D. A. PATTERSON; February 9, 1998

1. I dissent from the majority decision. I would not have exercised the Board's discretion in ordering the vote of the application by employees to terminate bargaining rights.

2. I do not believe there is any disagreement from the facts as stated by the majority in this matter. I strongly disagree with the approach adopted by my colleagues in their interpretation of the facts.

3. The majority has erred in its approach to this labour relations problem in this case. As a matter of opinion, the majority has put the union in a very weak position to face its members after a first contract. As proposed, the Board has said the union now has to stand alone while the employees cast their ballots over what kind of a job the union did since it was certified. This I believe is a very dangerous precedent, to have the union have to face such a vote after protracted negotiations and appearing before the Board on a first contract application. Any union would have difficulty maintaining a vote of confidence under similar circumstances.

4. I also believe the majority failed to take into account the agency rights and obligations the responding party has in this case. The union did not get a chance to demonstrate its ability to achieve a collective agreement or to do its job amongst a newly-organized bargaining unit. The union was cognizant of their obligation under the Act and the fact that they were counting the calendar down from the time they were certified. Their efforts should not be thwarted by the Board whose primary role is to further harmonious industrial relations between employees and employers. The Board should not react blindly to the realities of labour relations under these kinds of circumstances; to order the vote at this stage runs entirely in the wrong direction. The union should have been allowed to develop its relationship with both the employees, their members and the employer before entertaining a termination application. The employees will have their chance to determine what kind of a job the union did at the expiration of the accepted memorandum. At this stage, the parties are at an embryonic stage of the relationship, the relationship between the parties can hardly be considered one of any substance.

5. I would concur with the dissenting opinion of my colleague, J. A. Rundle, in Board File 1838-96-FC, in which she wrote, once a contract is accepted by the parties involved and notified, the contract is binding upon both parties. The termination application should not be allowed to scuttle the agreement after the fact.

6. I believe I would not be dissenting in this matter if the proposed memorandum of settlement was turned down by the employees. I believe the termination application would be timely and the Board should order a vote amongst employees because I would view the rejection as a vote of non-confidence in the union and the employer in the attempt to achieve a first collective agreement.

7. I do not buy into the principle that employees can certify a union, vote for the proposed collective agreement, then exert their rights to terminate the union conveniently after the collective agreement has been overwhelmingly accepted.

3779-97-U Power Workers' Union, Applicant v. Ontario Hydro, Responding Party

Lock-Out - Remedies - Ontario Hydro assigning several hundred employees to remain at home on full pay and benefits - PWU alleging that circumstances amounting to untimely and therefore unlawful lock-out within meaning of the Act - In absence of economic deterrent and where matter more appropriately dealt with through grievance arbitration process, Board finding it inappropriate to grant relief, even if lock-out committed - Board declining to determine whether economic sanction or detriment is necessary part of objective component of lock-out, or whether Ontario Hydro's conduct was motivated by a "view" to induce a bargaining concession

BEFORE: *Kevin Whitaker*, Vice-Chair.

APPEARANCES: *Linda Rothstein, Chris Dassios, John Murphy, Don McKinnon, Jim Zafiropoulos* for the applicant; *John Murray, Susan Serena and Tom Teahen* for the responding party.

DECISION OF THE BOARD; February 17, 1998

I

What This Case is About

1. In this case, the respondent employer is paying employees to sit at home. The applicant union claims that this is a lock-out and therefore illegal. The union would prefer that employees be laid-off. For reasons which follow, the application is dismissed.

2. The issue is unusual. Most employers would not be prepared to pay wages and benefits where they obtain no labour in return. The fact that the employer is a public utility operating from a monopoly position, makes the situation even more curious. To most observers, the employer's conduct would appear to be counter-intuitive.

3. The union's position might also be viewed with some surprise. The union would rather have some of its members laid-off and to be without pay. It does not wish its members to be paid to sit at home, free to spend their time as they wish.

4. This application is brought pursuant to section 101 of the *Labour Relations Act, 1995* (the "Act"). The applicant's argument is that the respondent is suspending active employment for a portion of the bargaining unit, to force bargaining concessions concerning lay-off provisions.

5. In response, the respondent suggests that a lock-out cannot exist if there is no economic detriment to employees. In the alternative, it is argued that even if it is possible to lock-out while paying full wages and benefits, the respondent did not do this with a "view" to compel or induce bargaining concessions. The respondent's explanation for its conduct is that it makes more sense from an operational perspective to pay employees to stay at home *rather* than invoke the lay-off provisions of the collective agreement.

6. On the issue of whether a lock-out must include economic sanction, I find that this question need not be decided. In the absence of economic detriment and in the particular circumstances of this case, it is not appropriate to grant any discretionary relief, even if a lock-out has been committed. On the issue of whether the respondent's conduct was motivated by a "view" to induce a bargaining concession, the evidence for and against is very close. As the matter may be disposed of on another basis, I will not rule on this point. I will say however that I could not conclude that the respondent's conduct is in any way cost effective, or that it necessarily makes operational sense.

II

The Facts

7. The respondent enjoys a monopoly position in providing electrical power in the Province. The applicant represents approximately fifteen thousand of the respondent's employees across many hundreds of classifications. The parties have a mature bargaining relationship.

8. The term of the current collective agreement is from April 1, 1996 to March 31, 2000. The agreement was negotiated following bargaining and mediation/arbitration before Mr. Justice Winkler of the Ontario Court, General Division. The collective agreement was settled by a Memorandum of Settlement dated November 19, 1996 and a Supplementary Memorandum of Settlement dated December 6, 1996. The agreement includes a "re-opener" clause which may be invoked mid-term on agreement. The parties have so agreed and talks were initially scheduled to begin in this regard in March of this year.

9. Article 11 of the current collective agreement lies at the heart of this case. This article deals with lay-off and job security. It would appear that the bulk of article 11 was negotiated in the last round of bargaining.

10. Despite the fact that the respondent freely agreed to this provision a mere year before the events dealt with here, it now takes the position that it is unworkable. According to the respondent, the provision is too expensive and too inflexible. The applicant holds a different view. The applicant suggests that article 11 is quite workable, as long as it is administered properly and in good faith.

11. In May of 1997, the respondent gave initial notices of lay-off to over 900 bargaining unit members. Less than a third of this number took advantage of a "cash-out" option and this left over 600 employees subject to lay-off.

12. The applicant at this point challenged the way in which the respondent proposed to administer the lay-off procedure. The applicant's challenges and disputes were put before Arbitrator Martin Teplitsky. A consent order was issued on October 24, 1997 in which a number of issues were determined with the unresolved balance adjourned.

13. On November 13, 1997, the respondent cancelled the pending notices of lay-off. This was following the release of a "White Paper" by the Provincial Government in which a number of significant restructuring proposals were suggested for both the respondent and its industry. In particular, the parties believed that the White Paper indicated the Government's intention to restructure the respondent by breaking it into a number of separate and distinct entities, and to remove its monopoly by permitting competition in the industry. It was expected that legislation for this purpose would be introduced in the spring of 1998.

14. The applicant supported the respondent's decision to suspend the planned lay-off. At the most general level, both parties recognized the heightened degree of uncertainty created by the White Paper and that a lay-off of the magnitude planned was simply not appropriate at the time.

15. In the beginning of December 1997, the applicant's President John Murphy, began a series of meetings with the respondent's Senior Vice-President of Corporate Human Resources, Chuck Gyles. These talks, described as "framework discussions" were undertaken in the shadow of the "re-opener" negotiations set to commence in March of 1998.

16. The initial results were viewed positively on both sides. These meetings were intended to be frank and direct discussions at the highest levels concerning the "big" issues outstanding between the parties. The respondent's unhappiness with article 11 was placed front and centre.

17. Sometime after the announcement to suspend the lay-off, Mr. Gyles issued a memo to managers in which he provided direction on staffing issues. Concerning "overcomplement staff", he had this to say:

2. Overcomplement Staff

As Managers confirm their staffing requirements the number of overcomplement staff will be determined. Managers should exercise their discretion regarding how to effectively deploy staff in overcomplement positions. The options include but are not limited to temporary assignments in the same work location, temporary assignments in another work location, projects, and where it is deemed prudent, employees may be given a work assignment at an educational facility, at an "outplacement service provider" (e.g. resume writing, interview techniques, etc.) or at home.

18. On December 19, 1997, the respondent announced by internal memorandum that all overcomplement staff would be transferred to a "Temporary Division". On January 12, 1998 staff in the Temporary Division, were to be assigned to remain at home on full pay and benefits. This was to continue "until the Article 11 process (or the process that will replace it) can be run".

19. On December 23, 1997, Mr. Murphy wrote to Mr. Giles in protest. Mr. Murphy suggested in strong terms that the strategy to pay people to sit at home would be embarrassing to the respondent and demoralizing to the workforce:

I hope to persuade you to put on hold Ontario Hydro's plan to pay over 350 employees for staying at home, beginning in early January. There are a number of issues to resolve before this should happen.

The first major issue is the negative impact this will have on Hydro's credibility and public image. It shouldn't take much imagination to predict the resultant headlines around the province decrying the fact that a debt-ridden utility that admits it doesn't have enough people to properly operate all its nuclear stations is actually paying people to sit at home. Reinforcing the image of wastefulness that already dogs Ontario Hydro will do nothing to assuage the concerns of the government and the general public about Hydro's fiscal responsibility and competitiveness.

20. On January 5 or 6, 1998, Mr. Giles called Mr. Murphy. Mr. Murphy explained that he considered this move by the respondent as an attempt to pressure the applicant to accept changes to the collective agreement. Both men testified about this conversation. Mr. Murphy's recollection of the conversation was that Mr. Giles did not contest the assertion that the respondent was trying to force a concession in bargaining. Mr. Giles remembers that he did contest Mr. Murphy's suggestion.

21. On January 7, 1998, the applicant issued a "President's Bulletin" to its membership and a press release for public distribution. In the press release, the applicant described the respondent's intentions:

The Union says the paid layoff makes no economic sense, but that it does make political sense. It accuses Hydro management of wasting money to try and stimulate public animosity towards the Power Workers' Union and thereby strengthen its hand in negotiations. The move is also designed, the PWU contends, to pressure the government into removing the Union's successor rights when Hydro is restructured through legislation later this year.

22. On January 8, 1998, Mr. Giles responded to Mr. Murphy by letter. Mr. Giles observed that the article 11 lay-off process was costly and difficult to administer. He suggested that it was more cost-effective to pay people to stay at home rather than invoke article 11, or to have people report to work when they are not required:

The current Article 11 process in the PWU Collective Agreement is extremely cumbersome, very costly to ratepayers and too disruptive to staff and their families. For example, it was estimated that had we implemented Article 11 in November of 1997, the hundreds of surplus employees impacted would have resulted in hundreds of household moves and a cost of tens of millions of dollars and significant disruption to hundreds of families.

Given the current lack of any alternative, informing overcomplement staff to no longer report to their normal workplace is the best available option. It is the least-cost employment option and the least disruptive to our employees.

23. As of January 12, 1998, a number of employees were paid to stay at home. The initial number was reduced because a number of employees were deployed to deal with an ice storm in eastern Ontario. At the time of the hearing, approximately 150 employees were at home with pay.

24. At the hearing, Mr. Murphy explained that while employees were sitting at home with pay, many vacancies were being left unfilled. He also stated that a vast quantity of work which could be performed by employees at home, remained untouched.

25. Mr. Giles testified that the decision to pay employees to remain at home made the most "business sense". One of the principal reasons behind this was that the entity within the respondent responsible for generating power ("Genco") did not want an influx of employees exercising bumping rights. This would occur if article 11 were to be invoked. At the same time, another internal entity responsible for service ("Servco") had been operating with a significant overcomplement for years. Servco wanted employees off its payroll and this was achieved by having them transferred to the Temporary Division.

26. Mr. Giles explained that this process had been used in the past, most recently in the fall of 1997 when a group of about 25 employees were paid (and are still being paid) to remain at home following the closing of a training facility.

III

Analysis

27. The application is brought pursuant to section 101 of the Act:

101. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that an employer or employers organization called or authorized or threatened to call or authorize an unlawful lock-out or locked out or threatened to lock out employees or that an officer, official or agent of an employer or employers' organization counselled or procured or supported or encouraged an unlawful lock-out or threatened an unlawful lock-out,

the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful lock-out or the threat of an unlawful lock-out.

28. Where the Board finds that an employer has committed an unlawful lock-out, section 101 provides the Board with two discretionary powers. The Board may declare that a lock-out has occurred *and* may also direct that appropriate action be taken as a result.

29. The respondent argued as a preliminary matter that the application should be dismissed because there was no evidence of economic detriment or sanction. The applicant argued that none was required. The applicant submitted in the alternative that economic sanction did exist to the extent that persons not working would suffer an erosion of skills and that this would work to their long term detriment. After hearing the respondent's argument on this preliminary issue, I directed the case to proceed on the merits. I was of the opinion that the applicant had an arguable case on this point.

30. The parties were agreed that there are two principal elements to a lock-out. The first is objective and refers to the physical and temporal circumstances. The second is subjective and refers to the intent of the respondent employer. These are described in paragraph 13 of the Board's decision in *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. 401:

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13. The definition of "lock-out" as found in the Act consists of two elements: the act and the motive or purpose for the act. In order to establish that a lock-out has occurred it is not sufficient merely to show that there has been a closing of a place of employment, or a suspension of work or a refusal by an employer to continue to employ a number of his employees (i.e. a plant closure, relocation, lay-off or contracting out of work etc.). It must also be established that any of these acts was done by the employer with a view to induce or compel *his employees* to refrain from exercising any rights or privileges under the act or to agree to provisions or changes in provisions respecting terms or conditions of employment etc. Motive is an integral component of the definition and as a result the economic consequences are not in themselves determinative of the issue. The economic consequence must be as a result of one or other of the acts contemplated by the definition having been done by the employer with a view to compel or induce *his employees* in the manner set out in the definition; both the act and the motive must relate to those persons in the employ of the employer as of the date of the lock-out (i.e. "his employees"). (See re *Harry Woods Transport Limited* case, [1976] OLRB Rep. July 341, *Livingston Transportation Limited* case, [1976] OLRB Rep. July 346, *Amalgamated Electric Corporation Limited* case, [1963] OLRB Rep. July 430, *Fleetwood Corporation* case, [1974] OLRB Rep. June 385, *James Howden and Parsons* [1974] OLRB Rep. June 385, *James Howden and Parsons of Canada Ltd.*, [1969] OLRB Rep. July 537 and *Ralph Milrod Metal Products Limited* case, Board Files Nos. 1274-76-U AND 1276-76-U, decision dated February 28, 1997).

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31. The respondent submits that the Board's jurisprudence, and indeed the jurisprudence in other Canadian jurisdictions makes it clear that a lock-out must include as a component of the first objective part, economic sanction or detriment. It is conceded by the respondent that the statutory definition is inclusive and that there is no explicit reference to such a requirement.

32. The parties were unable to find authority which addresses this question directly. Many cases refer to the requirement of economic detriment, but none deal with the applicant's argument in this case that it is not required. For example in *Humpty Dumpty*, *supra*, a majority of the panel of the Board noted at paragraph 14:

• • •

14. "The definition has been drafted to expansively encompass economic sanctions which are designed to bring pressure to bear on employees for the purpose of compelling or inducing them to make certain agreements or to refrain from exercising rights under the Act. The definition is an integral component of a legislative structure designed to preserve industrial peace during the term of a collective agreement and during the period of conciliation services, and at the same time to allow the employer the freedom to make business decisions during these periods which are not motivated by those factors set-out in the definition. Absent an explicit restriction, the definition must be read to include economic sanctions which compel or induce employees to accept altered conditions regardless of whether these altered conditions fall within or beyond the scope of a subsisting collective agreement. ...

33. My review of the jurisprudence leads me to conclude that the issue of whether economic sanction or detriment is a necessary part of the objective component of a lock-out, is undecided. I am also of the opinion that it need not be decided in this case.

34. Even if the applicant were correct on this issue and the respondent has in fact committed an illegal lock-out, this is not a case where it would be appropriate to exercise the discretion conferred by section 101 of the Act to issue a declaration or order a remedy.

35. My reasons for this conclusion are in essence twofold. Firstly, I find that as of yet there is in fact, no sanction or detriment, economic or otherwise. The period for which persons have remained home with pay is still brief, measured in weeks. There is no discontinuation of compensation, and the applicant's concerns about the pending "re-opener" negotiations or restructuring legislation remain in the middle to distant future. Secondly, I am of the view that the Board should be reluctant to exercise its discretion pursuant to section 101 of the Act in the absence of economic sanction or detriment. As the jurisprudence reveals, the Board's principle concern in lock-out cases has been with the consequences of economic sanction *and not* with the actual cessation of work. This is because the discontinuation of compensation may have destructive and perhaps irreparable consequences for the collective bargaining relationship. The same cannot be necessarily said for the cessation of work in and of itself.

36. There is also the issue of whether this matter is more appropriately dealt with elsewhere. On a very fundamental level, the real issue here is whether the respondent has succeeded in removing persons from the workplace in avoidance of job security obligations that arise from article 11. This is inherently a matter that flows from the collective agreement and may be litigated and enforced if necessary through the arbitral process. In applications under sections 100 (unlawful strike) and 101, the Board has routinely declined to exercise its discretionary authority where issues are more properly dealt with by the parties privately, through the grievance procedure. Particularly where there is an absence of economic sanction, this is the more appropriate process to invoke.

37. There is one last point to be made on this subject. The parties are agreed that many of the employees who are being paid to sit at home exercise sophisticated technical skills while at work. It was conceded by the respondent that these skills will erode and deteriorate if not practised on a regular basis. If these skills erode, there will be a tangible economic sanction to employees in that they become less marketable and unable to compete for job opportunities that would otherwise be available to them. This also was conceded by the respondent. Evidence in this regard was not lead with respect to specific employees. In circumstances where the matter was litigated less than a month from the date at which employees were sent home, this is understandable. It is the case however that with the passage of time, these skills may in fact deteriorate. To that extent and given my earlier comments, it may be the that this application is merely untimely as opposed to being without *potential* merit.

IV

The Issue of Intent

38. As the Board's jurisprudence indicates, before a lock-out can be found to exist, there must be a determination that the respondent's conduct was with a "view" to compel or induce particular action on the applicant's part.

39. As I indicated at the outset, I have declined to rule on this issue as the matter has been disposed of on other grounds. It is also the case that the applicant's complaint may only be premature on this first point and that in time, economic detriment will be apparent. For this reason and for the parties guidance, I will observe that the evidence put before me on intent was very close, for and against the applicant's case. I reiterate that I cannot conclude that the respondent's decision to pay employees to stay at home in these circumstances *necessarily* makes economic sense. Of course, this alone is not dispositive of intent but it is a significant factor that may eventually go to the issue if this matter is litigated subsequently.

V

40. For these reasons and with these observations, this application is dismissed. This dismissal is without prejudice to the applicant's ability to file any subsequent application should there be a material change in circumstances.

2837-97-U Ottawa-Carleton Regional Residential Treatment Centre, Applicant v. Canadian Union of Public Employees, Local 2376, Responding Party

Hospital Labour Disputes Arbitration Act - Reference - Employer operating centre providing long term residential treatment to conduct disordered adolescents - Board advising Minister that employer a "hospital" within meaning of Hospital Labour Disputes Arbitration Act

BEFORE: *Timothy W. Sargeant*, Vice-Chair, and Board Members *R. R. Montague* and *J. A. Rundle*.

DECISION OF THE BOARD; February 4, 1998

1. By reference dated October 29, 1997, the following question was referred to the Board for its advice by the Ministry of Labour pursuant to section 3(2) of the *Hospital Labour Disputes Arbitration Act* ("HLDAA").

Is the Employer a "hospital" within the meaning of the *Hospital Labour Disputes Arbitration Act*?

2. In a letter dated November 10, 1997, the parties were directed by the Registrar to file Statements of Representations on this issue.

3. By letter dated November 21, 1997, the Union filed its Statement of Representations.

4. By letter dated December 8, 1997, the Employer indicated:

Please be advised that the Employer does not wish to respond to the application before the Board.

We request that the Board render a decision without oral hearing on the matter.

5. By letter dated December 19, 1997, the Union made further submissions and agreed that "the Board may render a decision without an oral hearing".

6. Based on the material filed and the submissions of the parties the Board is prepared to render a decision without an oral hearing.

7. Based on such material, the Board finds that the Employer is an accredited, licensed Children's Mental Health Centre funded by the Ministry of Community and Social Services. The employer provides long term residential treatment to moderately to severely conduct disordered adolescents between 12 and 18. Additionally, the Centre provides some placements for Young Offenders serving open custody dispositions. All the programs within the Centre are co-educational and the 56 beds are split between eight residential units. Additionally, the Centre operates seven Section 27 classrooms in conjunction with two of the local boards of education. The Centre specializes in working with conduct disordered adolescents whose primary presenting problems include assault, sexual assault, running suicide attempts and fire setting. The Centre also operates two summer camps, a leased one at Hurds Lake and R.O.P.E. on a hundred acres of property outside Plantagenet. We have an Addiction Treatment Program for adolescents who are both severely conduct disordered and addicted.

8. The Centre is a not for profit corporation and is managed by a volunteer board of directors. It has been in existence since 1973. The Centre is sometimes referred to as The Roberts/Smart Centre in recognition of its two founders, Charles Robert, a psychiatrist and Russell Smart, a lawyer.

9. In addition, the Union submits the following Facts:

The Facts

6. The Canadian Union of Public Employees was certified as bargaining agent for "all employees of Ottawa-Carleton Regional Residential Treatment Centre in the Regional Municipality of Ottawa-Carleton, save and except co-ordinators, persons above the rank of co-ordinator, social workers, psychometrists, psychologists, recreationists, creation specialists, office and clerical staff, maintenance personnel, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons employed in connection with an accredited course of studies, "since April 14, 1980.

7. On September 29, 1994 the parties entered into a Collective Agreement for the period April 1, 1994 to March 31, 1995. This Agreement was subsequently extended without amendment to March 31, 1997.

8. The Ottawa-Carleton Regional Residential Treatment Centre, hereinafter called the Respondent, specializes in the treatment of adolescents, ages 12 - 17.

9. The Respondent operates "... nine residences with a total possible full-time resident population of sixty-two..." through which it delivers four (4) residential treatment programs:

- Secure Treatment
- Young Offenders
- Crisis Intervention
- Mental Health

10. In addition, primarily through these residences, the Respondent operates several Non-Residential programs:

- Aftercare
- Crisis Intervention
- Day Treatment
- School Programs
- Brighter Futures
- Therapeutic Camping*

* camping is residential in nature and residential clients attend

11. Article 1.01 of the Collective Agreement expiring March 31, 1997 states:

"It is the general purpose of this Agreement to promote the mutual interests of the Centre and its staff in the achievement of the proper *care and treatment* of the residents and non-resident youths; to promote the morale, and safeguard the well-being of all employees; to establish and maintain an orderly collective bargaining relationship between the Centre and its staff; to set forth all agreements concerning rates of pay, hours of work and working conditions to be observed by the parties hereto and to provide an amicable method of settling any differences that may arise in the interpretation, application, administration, or alleged violation of this Agreement." (emphasis added)

12. The Respondent has several promotional pamphlets. For the purposes of this application it is useful to see how the Respondent describes its functions. CUPE will be relying on these pamphlets to show that staff provide ongoing treatment obrieties and monitoring of the adolescents in treatment.

Pamphlet titled "*Secured Treatment*":

- "The Secure Treatment Program of the Roberts/Smarts Centre provides treatment for adolescents who have demonstrated that they are a danger to themselves or others and that they require services in a highly secure facility."
- "Admission Criteria (1) The court may decide that a child be committed to a secure treatment program only where it is satisfied that, (a) the child has a mental disorder."

Pamphlet titled "*Mental Health Residential Program*":

- "Purpose: The residential program of the Centre exists to provide care in both official languages for those adolescents who difficulties are of such a nature as to require treatment on a twenty-four basis."
- "Admission Criteria: A client admitted to the residential program shall: manifest a clinical picture assessed as moderate to severe in degree of disturbance."
- "Types of Clients: The Roberts/Smarts Centre specializes in treating adolescents with emotional and behavioural problems..."
- "Plans of Care/Treatment: Plans of Treatment are developed for each adolescent in residence an periodically updated over the course of treatment. The professional clinical staff, with collaborations of the adolescent, the parents or guardians, residential staff and other concerned professionals, are responsible for the development of each plan..."

Pamphlet titled "*Adolescents Substance Abuse Program*"

- "Purpose: The Adolescent Substance Abuse Program (A.S.A.P.) of the Roberts/Smarts Centre provides treatment in both official languages for those adolescents who suffer from substance abuse and mental health problems, primarily conduct disorder."
- "Type of Clients: This program is intended to respond to adolescents who have been diagnosed with mental health and substance abuses concerns."
- "Treatment: Treatment of the dually diagnosed adolescent is an attempt to engage the adolescent in a psychosocial therapeutic process involving mastery of pro-social skills and self-regulation which make possible a productive and satisfying life..."

Pamphlet titled "*Treatment*":

- "The Roberts/Smart Centre is a children's mental health centre. It is committed to providing professional treatment services for conduct-disordered adolescents."

13. The Respondent provides an orientation and training course to its new employees for

which it provides a manual. The Respondent considers this manual as describing work-place standards and requires employees to sign off on each section it covers during their orientation.

"Introduction To The Roberts/Smarts Centre:

The Roberts/Smarts Centre is an accredited, licensed Children's Mental Health Centre and is funded by the Ministry of Community and Social Services to provide long term residential treatment to moderately to severely conduct disordered adolescents between 12 and 18."

"The Mission: The Roberts/Smarts Centre is dedicated to fostering in both official cultures, the well-being of selected adolescents and their families with exceptional psychosocial needs, through services in treatment, intervention, young offender and community support."

"What is Treatment at The Roberts/Smarts Centre? The attempt to engage an adolescent in a Psychosocial Therapeutic Process Involving the mastery of such positive social skills and self regulation as to make possible a productive and satisfying life."

14. There are two full-time and one part-time youth councillor classifications, and one night worker classification within the bargaining unit. There are no other classifications. The following is extracted from the Youth Councillor and Night Worker descriptions which the Union will be relying on to show that the adolescent in the treatment centres require twenty-four (24) hour care and treatment and is provided with such by all bargaining unit classifications.

Job Descriptions

- | | | |
|-----|------------------------------------|--|
| (a) | <u>"Position Title:</u> | Youth Councillor I, Residential Program |
| | <u>Purpose of Position:</u> | To provide care and treatment to youths in residential treatment program..." |
| (b) | <u>"Position Title:</u> | Youth Councillor II, Residential Program |
| | <u>Purpose of Position</u> | To provide care and treatment to youths in a residential treatment program, and to assume additional responsibilities for the program under the direction of the Residence Coordinator..." |
| (c) | <u>"Position Title:</u> | Night Worker, Residential Program |
| | <u>Purpose of Position:</u> | To provide care and monitoring to youths in a residential treatment program..." |

15. The Respondent's orientation manual states:

"Use of On-call System - Rationale: The residential nature of the Centre requires that there be a system in place to respond to crisis, special events and staff concerns on a 24 hour a day basis."

"Administration of Medications - Rationale: The administration of all medications to the adolescents in care at the Centre must be done under close supervision and only when prescribed by a physician. The adolescents safety must be ensured at all times."

Table describing resident make-up, "Percentage of dangerous clients in the Centre - 1991 - 80%; 1992 - 87%; 1993 - 82%; 1994 - 73%,

16. Respondents pamphlet titled "*Secure Treatment*":

"The Secure Treatment Program of the Roberts/Smarts Centre provides treatment for adolescents who have demonstrated that they are a danger to themselves or others and that they require services in a highly secure facility."

10. In its submission the union argues that the employer is a hospital within the meaning of section 1(1)(a) of HLDA. The submission refers to a number of authorities including *Canadian Union of Public Employees, Local 2592 vs. Dignicare Incorporated* an unreported decision of the Divisional Court dated February 12, 1991. In the decision, the Court held in part:

"The Ministry of Labour erred in law when they determined that an institution must be providing "medical care or treatment of a medical nature to its residents" (July 21st decision), or "care observation or treatment of a medical nature" to its residents (December 8th decision), in order for the institution to be a "hospital" as defined by the Act.

In light of the use of the words "observation, care or treatment" in the statute, the Ministers erred in determining that an institution would fall within the definition of "hospital" in the Act only if the care, observation or treatment provided by the institution was of a medical nature and only if the institution was similar in nature to a hospital, sanatorium, sanatorium, or nursing home."

11. The Board agrees with the submission of the union and finds on the material filed that the employer is an institution that offers observation, care and/or treatment for residents who suffer from physical or mental illness, disease or injuries on both a medical and personal level.

12. Therefore the advice to the Ministry of Labour is that the employer is a Hospital within the meaning of the *Hospital Labour Disputes Arbitration Act*.

CONCURRING OPINION OF BOARD MEMBER J. A. RUNDLE; February 4, 1998

I have never understood why trade unions that purport to believe in the right to strike, seek designation under the *Hospital Labour Disputes Arbitration Act* which deprives employees of the right to strike.

1285-97-R National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Applicant v. **Sivaco Ontario**, Responding Party

Certification - Employee - Board finding Quality Assurance Technicians employed by metal, wire and rod manufacturer to be employees within meaning of the Act

BEFORE: Kevin Whitaker, Vice-Chair.

APPEARANCES: John Brady, Dan MacPherson, Duane Burk and Wes Davie for the applicant; Edward J. McDermott, Bruce Roddick and M. Lonsbary for the responding party.

DECISION OF THE BOARD; January 23, 1998

I

1. This is an application for certification. By decision dated July 17, 1997, a representation vote was ordered and held on July 28, 1997. Five ballots were cast and counted. Four ballots were marked in favour of the applicant and one ballot was marked against the applicant.

2. The applicant sought the following bargaining unit:

all employees of Sivaco Ontario, in the City of Ingersoll, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons covered by a previous Ontario Labour Relations Board certificate.

3. From the outset of the application, the respondent took the position that the bargaining unit sought by the applicant was inappropriate on the basis that it included only persons who are not employees for purposes of section 1(3)(b) of the *Labour Relations Act, 1995* (the "Act"). The respondent argued that these persons exercise managerial functions and ought to be excluded on that basis. This dispute was the only remaining issue to be determined.

4. A hearing was held on September 2 and 3, 1997. On September 8, 1997, the Board issued a decision finding that the bargaining unit proposed by the applicant was appropriate. A certificate was issued on that basis. What follows are the reasons for the decision of September 8, 1997.

II

5. The respondent manufactures metal, wire and rod products which are used in the automotive industry. Most of the respondent's clients are automotive parts manufacturers who use the respondent's products in their own manufacturing processes.

6. The applicant has for many years, represented a production bargaining unit of the respondent's employees. That bargaining unit is described in the most recent collective agreement between the parties in the following terms:

all employees of Sivaco Ontario at Ingersoll, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff.

7. The five persons whose status is contested are employed as Quality Assurance Technicians ("QAs"). The respondent suggests that there are four principal reasons for determining that these persons exercise managerial functions:

- (i) That the recognition clause in the existing collective agreement between the parties with respect to production employees, with the exception of "persons covered by an existing collective agreement" mirrors the exemptions in the bargaining unit sought by the applicant here. It is argued that this indicates the parties' intention that QA's are to be considered management;
- (ii) QAs enjoy as part of their terms and conditions of employment, a number of "management" indicia;
- (iii) Part of the job duties of QA's is to work on a regular basis as an acting supervisor (an agreed management exclusion);
- (iv) The most central and critical part of a QA's job is to identify either material or process defects in product which could and have resulted in the discipline of bargaining unit members, albeit members of the existing production bargaining unit. This, it is suggested, amounts to managerial duties placing the QAs in a serious conflict of loyalties and duties.

8. The respondent called as a witness, Bruce Roddick, General Manager. The applicant called as a witness, Duane Burk QA.

9. The evidence indicates that QA's are responsible for monitoring on an ongoing basis, the quality of product. There is no dispute that they are *not* responsible for monitoring the performance of employees. While it is true that QA's may find fault with product which may in turn reflect detrimentally on the quality of work performed by other employees, the decisions which must be made concerning the consequences of faulty work are not made by QA's, but by persons who are clearly members of management. The QA's role is to monitor and identify the quality of product. Decisions about how to deal with defects are left to management.

10. With respect to the issue of whether the parties may be taken by their conduct to have understood QA's to be managerial, even if that were the case, the parties cannot by agreement determine a class of employees to be excluded as management if in fact, their duties do not justify such a conclusion. The parties' conduct in this regard is certainly a factor to consider along with other evidence, but it is not in itself conclusive of the issue.

11. With respect to the QA's role as acting supervisor, I am satisfied that in practice, QA's do not exercise in this role, the traditional types of authorities usually attributable to management. In other words, while acting as supervisors, QA's do not exercise any serious degree of control over the economic livelihoods of other persons who are employees for purposes of the Act.

12. Finally, with respect to the issue of whether QA's enjoy as terms and conditions of employment, some of the usual "indicia" of management, it is true that they are not treated the same as "hourly" employees in all respects. On balance however, I find that the differences in treatment are not sufficient to warrant a determination that QA's are not employees for purposes of the Act having regard in particular to the actual job duties performed.

III

13. In summary, I find that QA's are employees for purposes of the Act.

2801-97-U United Steelworkers of America, Local 1005 ("union"), Applicant v. Stelco Inc. (Hilton Works) ("company"), Responding Party

Duty to Bargain in Good Faith - Practice and Procedure - Interim Relief - Unfair Labour Practice - Responding employer seeking order requiring non-party to produce certain material described as necessary to preparation of proper response to unfair labour practice complaint - Board concluding that it is inappropriate for it to make a pre-pleading production order - Employer's motion dismissed - Board also vacating summons made returnable at pleading stage as premature

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *P. Turtle, Doug Olthuis and Warren Smith* for the applicant; *Stephen J. Shamie, Elizabeth M. Brown, Amanda Hunter, Robert Jones and Rodger Fulton* for the responding party; *Glenn Frelick and Deric Jacklin* for the Pension Commission of Ontario.

DECISION OF THE BOARD; January 29, 1998

1. By decision dated January 22, 1998 the Board dismissed the company's motion for a pre-pleading production order. The Board's reasons for that decision follow herein. This decision also deals with the Board summons issue which was not addressed in the January 22, 1998 decision.
2. This is a complaint under section 96 of the *Labour Relations Act, 1995*. The union alleges that the company conducted itself in a manner contrary to section 17 of the Act in the collective bargaining which led to the collective agreement currently in effect between them.
3. Although only filed on October 28, 1997, this complaint already has a "history". However, the manner in which the parties decided to proceed meant that that history, while interesting, is not germane to the issues before me at the hearing on January 12, 1998.
4. The company moved for a production order requiring the Pension Commission of Ontario to produce documents which the company asserted are relevant and which it said it requires in order to prepare a proper response to the complaint. The motion was opposed by the Commission and by the union. Also in issue were two Board summonses which the company had served on the Commission's Director of Research and Policy, Mr. Nurez Jiwani.
5. The company identified the documents in issue as follows:
 1. All records showing access to the Stelco Inc. Bargaining Unit Pension Plan for Members of the United Steelworkers of America, Registration Number 0354878 by name, organization, if applicable, date and time between June 14, 1996 and July 27, 1997 [the "access records"]
 2. All records and documents in the possession of the Pension Commission of Ontario that are submissions from unions or other labour organizations (including any documents indicating the position of such unions or organizations) and responses to those submissions or notes relating to the submissions that were heard or received relating to section 5.1 of Regulation 909 to the *Pension Benefits Act* as amended by Regulation 712/92 prior to November 26, 1992, the date the Regulation came into effect [the "submissions documents"].
6. The motion raised a novel issue. The question was whether the Board can or should make a pre-pleading production order against the Commission, which is neither a party nor has any interest in the proceeding. Counsel were unable to find any *quasi-judicial* or judicial decision which is directly on point, and I am unaware of any.
7. The company argued that this complaint concerns the manner in which the collective bargaining in question was conducted, and that the conduct and knowledge of the negotiators for both parties is therefore in issue. The complaint concerns that collective bargaining between them for the collective agreement currently in effect between the parties, and the company's subsequent election, under section 5.1 of Regulation 909 under the *Pension Benefits Act*, not to make solvency deficiency payments with respect to the defined benefit pension plan in the collective agreement. Although this election was made on June 14, 1996, the union asserts in its complaint that it first became aware of it on June 25, 1997.
8. The company argued that it is required and entitled to file a complete response to the complaint, and that it requires the documents it sought to have produced for that purpose.
9. The company submitted that it required the access records kept by the Commission in order to ascertain whether there is a basis for arguing that the complaint should be dismissed on the basis of delay.

10. The company submitted that it requires the submissions documents in order to prove the nature and extent of the knowledge of the union's negotiators of the existence and operation of section 5.1 of Regulation 909 of the *Pension Benefits Act*, and that the position which the union took with respect to that provision before it became law is relevant to the matters in issue. The company asserted that it would be prejudiced if it is refused access to these documents before it files its response. In that respect, the company submitted that it is entitled to know the facts before it has to plead its response as a matter of natural justice, and that the production it seeks would expedite the proceeding.

11. To date, the Commission has denied the company's request for the documents, and has refused to respond to the summonses which have been served in that respect. The company has also requested the documents in question under the *Freedom of Information and Protection Privacy Act*. As of January 12, 1998, it had not received a response to that request.

12. Counsel for the Commission submitted that the Board's consideration of the company's motion should take into account whether the documents in question are relevant, whether they are protected from disclosure, and the effect of the order sought on the Commission's ability to fulfill its regulatory functions. Counsel referred to the provisions of the *Pension Benefits Act*, and pointed out that this legislation is intended to benefit employees, and that in administering that legislation the Commission must treat both plan beneficiaries and employers in a fair and even-handed manner. Counsel submitted that the access records sought by the company contain personal information which is provided on a confidential basis, and which is normally not made available under the *Freedom of Information and Protection Privacy Act*. Counsel expressed the Commission's concern that there could be a chilling effect on the willingness of plan beneficiaries to bring pension concerns to the Commission's attention if it was required to produce the documents requested, and that requiring the Commission to produce the documents would undermine the Commission's functions and ability to administer the *Pension Benefits Act*. Counsel argued that it would also be contrary to the public interest to require production of the access records.

13. With respect to the submissions documents, counsel for the Commission expressed a concern with the scope of the company's request, which he submitted would include privileged documents. Counsel argued that to the extent that the submissions documents requested are not privileged, it would be contrary to the public interest to require that they be produced.

14. Finally, counsel submitted that the November 19, 1997 summons issued to Mr. Jiwani is void on its face, and that the January 2, 1998 summons is both premature and not properly issued in the exercise of the Board's power under section 111(2)(c) of the *Labour Relations Act, 1995*, because the company has not established the relevance of the documents it seeks.

15. The union did not take issue with the Board's jurisdiction to order production of the documents sought under section 98 of the *Labour Relations Act, 1995*, or under the *Statutory Powers Procedure Act*. However, counsel referred the Board to the decision in *Shaw-Almex Industries Limited*, [1984] OLRB Rep. April 659 and to Rule 30.10 of the Ontario Civil Rules of Procedure, and submitted that the Board should decline to make the orders sought on the basis that the company is "fishing" to see if it has a case, and because it is an abuse of process in that it would require a great number of insufficiently relevant documents to be produced. Counsel also agreed with the submissions of counsel for the Commission in that respect.

16. Further, counsel for the union submitted that the company has failed to demonstrate the relevance of either the access records or the submissions documents. In that respect, she referred to *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411 and argued that the knowledge or conduct of the union's negotiators is not in issue in this complaint, and that the company does not require the documents in issue in order to plead its case. Counsel submitted that the questions raised

are evidentiary matters which were properly dealt with during the hearing of the complaint on the merits.

17. The company has estimated the potential value of this complaint to be approximately \$350 million. The union did not suggest otherwise. The complaint is also important to the parties because of its labour relations ramifications.

18. The applicant union has pleaded its complaint. The responding company has not filed a response. It seeks production of documents which it only suspects may exist, at least some of which originated with the applicant or an affiliated entity if they exist at all, not from the applicant, but from an uninterested third party, which happens to be a regulatory agency of the government established to, among other things, administer the legislation which governs the pension plan with which this complaint is concerned.

19. In what is admittedly a novel motion, it is useful to start with first principles, and to ask:

(a) is there a reason why this motion is novel?

(b) how should it be disposed of?

20. There are few absolutes in law, but they do exist. Everyone involved in a judicial or *quasi-judicial* proceeding is entitled to be treated fairly and in accordance with the principles of natural justice. But what constitutes fairness, or what satisfies or is required by natural justice depends on the circumstances.

21. As a matter of both fairness and natural justice, a party against which allegations of wrongdoing are made must be given sufficient notice of the allegations to enable it to discern the case which is alleged against it and prepare its answer in that respect. The Board has long recognized this, and both in its Rules and otherwise has required everyone who alleges that the Act has been breached to identify the breaches alleged, the party alleged to have committed them, the relief requested, and to plead the material facts upon which it relies in that respect with particularity (see sections 12, 16 and 20 of the Board's current Rules of Procedure).

22. A more recent development (relatively speaking), is the requirement that a party which is identified in an application or complaint to the Board file an equally particularized response if it wishes to oppose the application or complaint or otherwise participate in the proceeding (sections 13, 14, 16 and 20 of the Board's Rules).

23. Further, every party must produce copies of the documents upon which it intends to rely to the Board and to the other parties, prior to the hearing (sections 15 and 20 of the Rules).

24. In this case, there was no suggestion that the union's complaint lacks particularity or that the company has any difficulty in discerning the case which must be answered. Further, the company appears to have a reasonably well developed theory of its own case. What the company seeks, in effect, is some discovery of some aspects of its theory, apparently so that it can assess the probable strength of certain aspects of the defence it is contemplating, before it pleads its case. Moreover, it seeks this discovery from a non-party.

25. It has been suggested that as a matter of natural justice a party is entitled to the production of relevant documents, if necessary by order of the tribunal (*Canadian Fishing Co. v. Smith* (1962) 35 D.L.R. (2d) 355 (BCCA); *Furniture Workers' Union v. Alberta (Board of Industrial Relations)* (1969) 60 L.R. (3d) 83 (Alberta Supreme Court); *Carter v. Phillips* (1987) 59 O.R. (2d) 289 (Divisional Court);

United Brotherhood of Carpenters and Joiners of America, Local 1238 v. Maclean Construction Limited Employees (1984) 153 A.P.R. 217 (P.E.I. Supreme Court)). However, that is no more than a statement of a branch of the trite proposition that, subject to any applicable privilege or other exclusionary rule, a party is entitled to have relevant evidence produced during either a pre-hearing discovery process (like the pre-trial discovery processes the courts employ) or the hearing itself. It does not mean that a party is entitled to pre-pleading production.

26. Neither fairness or natural justice entitle the company to the discovery it seeks in this case. It is important to remember that there is a difference between pleadings and proof. Pleadings are not an end in themselves. The purpose of pleadings is to define the dispute and the issues which will have to be determined, and to give each party notice of the case it must meet in that respect. Pleading a case and proving it are two very different things. Questions of relevance can only be determined by reference to the pleadings, and questions of what can or must be proved can only be determined having regard to the structure provided to the proceeding by the pleadings.

27. It is true that even with pleadings, it is sometimes difficult to determine whether a fact or document is relevant until all the evidence is in and the parties have made their submissions. In such a situation, the Board will admit otherwise admissible information or documents on the basis that it is arguably relevant to the matters in issue. The Board developed this approach in an attempt to speed up its proceedings at a time when the pleading requirements in Board proceedings were not as stringent as they are now. Nevertheless, there remain occasions when this approach will be appropriate. But even arguable relevance can only be determined having regard to the pleadings. For information or a document to be even arguably relevant, there must be some theory on which it relates to the issues, which issues are defined by the pleadings. Consequently, it cannot be said that something will be arguably relevant and admissible at a hearing before the pleadings which give structure to the proceeding are in. Before that, the question of relevance is premature.

28. The fact is that at this point neither delay, nor the conduct or knowledge of the union's negotiators, assuming that that can be an issue in a complaint such as this one, has been placed in issue. The documents which the company seeks to have produced are not necessary to enable it to plead its case or any aspect of it, although they or some of them may be relevant or necessary to prove the case which it appears the company intends to plead. This is the time for pleading, not for proof.

29. Of course, it is appropriate that a party not advance an allegation or position which is frivolous, vexatious, abusive, or completely without foundation. It is appropriate that a party make whatever investigations it can of the case against it and of its answer. But it is not entitled to use the Board's processes to force either another party or a stranger to the proceeding to assist it in discovering whether it has a tenable position or defence particularly when it is unable to say whether information or documents it seeks even exist. The Board's production and subpoena powers are not there to assist parties in fishing expeditions.

30. In this case, the company is suspicious of the time between the date it made its section 5.1 election and the date this complaint was filed, and of the union's assertion that it did not become aware of the election until almost a year after it was made. Without more, mere suspicion is not enough to engage the Board's processes at this stage of the proceeding or perhaps ever.

31. The same is true even in proceedings under section 1(4) (related employer) and 69 (sale of a business) of the Act, an example of which is the *Highland York Flooring Company Limited*, [1993] OLRB Rep. July 607, decision cited by the company. As the reverse evidentiary onus provisions of subsections 1(5) and 69(13) suggest, the nature of those proceedings is somewhat different from that of unfair labour practice proceedings (including those to which the reverse burden of proof provisions of subsection 96(5) of the Act apply). Nevertheless, even in those proceedings, where the Board has

ordered pre-hearing production, it has done so after pleadings have been closed (which includes circumstances in which a party has failed to file a pleading but the time for doing so has expired).

32. As far as I am aware, neither this Board nor any other judicial or *quasi-judicial* tribunal has ever ordered that pre-hearing production be made to a party which has not filed its own pleadings in the proceeding. Although the Board's jurisdiction to make such an order under the *Labour Relations Act, 1995* or the *Statutory Powers Procedure Act*, was not challenged in this case, it is not at all clear that the Board has such a jurisdiction. The Supreme Court of Canada's decision in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Association* (1993) 93 CLLC ¶14,062; (1993), 108 D.L.R. (4th) 1, suggests that a general provision like section 98 of the *Labour Relations Act, 1995* or sections 5.4 and 16.1 of the *Statutory Powers Procedure Act* do not confer such a jurisdiction, particularly when it comes to non-parties. In any event, it is inappropriate for the Board to make a pre-pleading production order except where the applicable legislation specifically contemplates such an extraordinary order.

33. In the result in this case, I am not satisfied that either of the production orders requested is necessary or appropriate. The company's motion is therefore dismissed.

34. Turning to the two Board's summonses which have been served to Mr. Jiwani, the first one (dated November 19, 1997) contains no date, time or place at which it is returnable. Accordingly, it is defective on its face. It is therefore vacated.

35. The second summons, dated January 2, 1998, was returnable at the January 12, 1998 hearing and raises different issues.

36. It has been observed that issuing a summons is a judicial or *quasi-judicial* act which requires the tribunal under whose authority it is issued to exercise its discretion in that respect (except where the legislation provides otherwise). Accordingly, a summons should not be issued unless the tribunal is first satisfied that the purpose of the summons is to secure information which is useful, necessary and admissible in the proceedings to which the summons relates (see, Robert W. MaCaulay, Q.C. and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (1997, Carswell, Scarborough) at Volume 2, pages 12-80 to 12-88). The practice of automatically providing blank pre-signed summonses has been criticized on that basis.

37. As a theoretical matter that is quite correct. Indeed, some tribunals do perform at least some screening of requests for summonses (the Workplace Safety and Insurance Appeals Tribunal, formerly the Workers' Compensation Appeals Tribunal, for example). Others do not. Interestingly, the *Becker Milk Company Limited*, [1974] OLRB Rep. Oct. 732 decision cited at length by MaCaulay and Sprague in that respect is a decision of this Board, which has long had a practice of issuing pre-signed blank summonses, both to parties in a particular proceeding, and in bulk to counsel who regularly appear before the Board. It would be an inappropriate use of the Board's scarce resources to conduct an inquiry every time a party wants to subpoena someone as a witness or to engage the Board's powers in order to secure the production of documents. Further, the Board's practice reflects what I understand continues to be the practice of the Ontario Court (General Division).

38. This does not mean that every Board summons is valid or will be enforced, even if it is properly served. A challenge to a summons is properly made to the Board at the time appropriate in the circumstances. This will inevitably be after the summons has been served. But as a matter of process delays can be minimized while the right to make objections to the summons is preserved.

39. The purpose of a Board summons is to obtain the attendance of a witness who can give relevant material and admissible evidence, or to obtain the production of documents which are relevant, material and admissible at the hearing at which the issues to which the evidence relates are being dealt

with. At the pleading stage, such a summons is premature. Nor is such a summons the appropriate means by which pre-hearing production may be obtained. Accordingly, I am satisfied that the second summons in this case should be vacated as well, and I so order.

40. Although this disposes of the issues raised at the hearing on January 12, 1998, the result is somewhat unsatisfactory because if the company pleads its case as everyone appears to anticipate it will, many of the issues of relevance, necessity, privilege and public interest which were addressed in argument are likely to have to be revisited. However, in my experience, it is generally less than useful to anticipate what might happen, and I am not seized with this matter. Accordingly, I decline to comment further on the issues of relevance, privilege, confidentiality or public interest, except to say that the production sought by the company appears to be overly broad even as an evidentiary matter.

1881-96-OH Selwyn Pieters, Applicant v. Toronto Board of Education (Plant Operations), Responding Party v. Canadian Union of Public Employees, Local 134 and the African Canadian Legal Clinic, Intervenor

Constitutional Law - Charter of Rights and Freedoms - Health and Safety - Reconsideration - Board earlier declining to inquire into application under Occupational Health and Safety Act on ground that application, in essence, a complaint about race discrimination and because that matter should be dealt with by Ontario Human Rights Commission - Applicant requesting reconsideration on several grounds, including submission that Board had exercised its discretion in a manner that contravened section 15 of the Charter and sections 1, 9 and 11 of the Human Rights Code - Request for reconsideration dismissed

BEFORE: *Kevin Whitaker*, Vice-Chair.

APPEARANCES: *Selwyn Pieters* for the applicant; *S.C. Raymond*, *G.G. Vuicic*, *Lilianna Simonetta*, *Tony Eichhorn* and *Chad Scarlett* for the responding party; *Judith McCormack*, *Steve Lillico*, *Dave Smith* and *John Weatherup* for Canadian Union of Public Employees, Local 134; *Michelle Williams* for the African Canadian Legal Clinic.

DECISION OF THE BOARD; January 15, 1998

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1. This is a request for reconsideration by the applicant in a complaint under section 50 of the *Occupational Health and Safety Act* (the "OHSA"). The Board is asked to reconsider its decision of May 21, 1997 which dismissed the complaint. The two intervenors, the Canadian Union of Public Employees Local 134 ("CUPE") and the African Canadian Legal Clinic (the "ACLC") support the request for reconsideration. The respondent opposes reconsideration. For reasons which follow, the request for reconsideration is dismissed.

2. The applicant is an African Canadian. In the complaint, he alleged that he was harassed and discriminated against by his employer on the basis of his race. The alleged acts of discrimination and harassment included in part, exposure to physical hazards in the workplace. As a preliminary matter, the respondent conceded that the Board had jurisdiction over the matter but argued that as the complaint was about a violation of human rights, the Board should exercise its discretion under section 50(3) of OHSA by dismissing the application. In the respondent's view, the complaint was more properly brought before the Ontario Human Rights Commission (the "Commission").

3. In response, the applicant argued that the complaint was broader than the respondent's characterization and not just about issues of discrimination and harassment on the basis of race. Alternatively, the applicant took the position that even if the respondent's characterization was correct, deferral was inappropriate as there was no outstanding application before the Commission. The applicant also suggested that deferral to the Commission would be inappropriate because the Commission has failed and will continue to fail to properly exercise its jurisdiction.

4. A hearing of the Board was convened before a panel consisting of myself, Board Member H. Peacock and Board Member (as she then was) S. C. Laing. Argument was heard on a number of preliminary issues including the issue of deferral to the Commission. On the issue of deferral, the applicant wished to call factual and expert opinion evidence to establish that the Commission was not properly exercising its mandate under the *Ontario Human Rights Code* (the "Code").

5. For the purposes only of dealing with the preliminary motion on deferral, the Board accepted as proven, the allegations set out in the complaint. The Board declined to hear evidence concerning the efficacy of the Commission. In its decision of May 21, 1997, the Board determined that the matter was principally about harassment and discrimination on the basis of race. Further and on that basis, the Board concluded that it should exercise its discretion under section 50(3) of OHSA by declining to inquire into the complaint as it was more appropriately brought before the Commission.

6. The applicant seeks reconsideration of the Board's earlier decision on the following grounds:

1. that the Board made a number of significant factual errors;
2. that the Board erred in declining to hear evidence concerning the Commission's failure to exercise its jurisdiction under the Code;
3. that the Board erred in its exercise of discretion pursuant to section 50(3) of the OHSA generally and more particularly;
4. that the Board exercised its discretion in a manner which contravened section 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter") and sections 1, 9 and 11 of the Code.

7. The applicant asserted that reconsideration was appropriate as there was evidence now available which could not have been obtained before by due diligence. It was suggested that the Board's earlier decision was contrary to Board policy, patently unreasonable and wrong in law. It was also argued that there were significant issues of law and policy raised in the complaint which alone would justify a review of the earlier decision.

8. The two intervenors adopted the applicant's position in its entirety. The respondent opposed reconsideration on the basis that the Board's established threshold criteria for reconsideration were not met. Alternatively, it was argued that the earlier decision was correct in any event.

9. By endorsement of July 7, 1997, the panel of the Board who issued the decision of May 21, 1997 directed that a hearing be held for purposes of considering the application for reconsideration. The matter was heard on September 24, 1997. The Board reserved its decision at that time.

II

The Standard for Reconsideration

10. The main thrust of the respondent's opposition to reconsideration is based on the Board's jurisprudence dealing with its reconsideration powers. The Board enjoys a broad discretion to reconsider

its decisions. Section 50(4) of OHSA provides for the application of what is now section 114 (1) of the *Labour Relations Act, 1995* (the Act”) in proceedings under section 50 of OHSA. Section 114(1) of the Act provides as follows:

114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

11. The Board has over a series of decisions, established a structure for the exercise of its reconsideration discretion. This structure represents an attempt to balance the need for finality in decision making, with an ability to correct decisions that are either wrong or made in error. Throughout this body of jurisprudence, the Board has often commented on the need for finality in labour relations adjudication. Unlike some other forms of litigation, parties who bargain collectively usually co-exist in long term relationships. The success of this co-existence depends in part on the parties’ awareness of their relative positions on an ongoing day to day basis. This requires not only speedy adjudication, but final dispositions that may be relied upon for planning purposes.

12. The respondent suggested that the Board’s threshold test for permitting an application for reconsideration is set out in *K-Mart Canada Limited (Peterborough)* [1981] OLRB Rep. Feb. 185 at paragraph 4:

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4. To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to consider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representation which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party’s conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Faculty Association, York University*, 78 CLLC ¶14,132 (Ont. Div. Ct.).

13. The applicant and intervenors argued that the appropriate threshold test was broader. In their view, the Board may also appropriately reconsider where the original decision is either wrong in law or if there are significant issues of law or Board policy to consider. In support of this proposition, the applicant relied upon the following passage from the Board’s decision in *John Entwistle Construction Limited* [1979] OLRB Rep. Nov. 1096 at paragraph 5:

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5. The Board exercises its jurisdiction under section 95(1) of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

“Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a

party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously."

These are generally standards which the Board has developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly. Although neither of the two conditions precedent stated in the *Canadian Union of General Employees* case, *supra*, are satisfied here, the request does raise significant and important issues of Board policy and for this reason the Board will review its decision to determine if it should vary or revoke the decision.

14. The applicant and intervenors also find support for their position in paragraph 4 of the Board's decision in *Imperial Tobacco Products (Ontario) Limited, Tobacco Workers International Union, Local 323, Charles Hill, Alexander Jackson, Sydney Harker, John Wynd, Albert Battell, Anstruther Williamson, George Jones, Harvey Stewart, Leslie Cook and Bruce Starkey*, [1974] OLRB Rep. Sept. 609:

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4. In this case no question of additional evidence is involved. In fact the original hearing involved very little evidence and was devoted to rather detailed legal argument that could be characterized as preliminary in nature. Rather in this case, one of the respondents wishes to make additional legal argument although it had every opportunity to make submission to the Board at the original hearing. For this reason alone the Board should be exceptionally cautious in even beginning to entertain reargument. But having said this, it should not be said that the Board will never listen to additional legal argument particularly when its original decision is clearly wrong in law or inadvertently contrary to earlier Board practice. In such circumstances it is indeed fortunate that the Board has power to correct its error and thereby avoid the need for one or both of the parties to spend the time and money entailed in having some other forum consider the Board's decision (which, having regard to the privative clause in the legislation, might prove fruitless in any event).

15. There is little doubt that the formulation in *K-Mart*, *supra* is widely understood to accurately capture the Board's approach in reconsideration requests. Do the Board's decisions in *Imperial Tobacco* and *John Entwistle* suggest a different standard, and if so is it the correct one? It should be noted in passing that none of the parties suggested that the standards for reconsideration should be different in this case because the application arises under the OHSA as opposed to the Act. This makes sense, given the fact that in this case particularly, the workplace was organized and the events in issue took place within a collective bargaining environment. For these reasons, the same policy considerations apply.

16. Both *Imperial Tobacco* and *John Entwistle* begin their discussion of the scope of the Board's reconsideration power by referring to the usual concerns about expedition and finality in collective bargaining matters. In *Imperial Tobacco*, then Chair G.W. Adams observed that in order to protect the finality of the decision making process, the Board should be "exceptionally cautious" about entertaining "reargument". The decision then goes on to say "it should not be said that the Board will *never* listen to additional legal argument particularly when its decision is *clearly* wrong in law or *inadvertently* contrary to Board practice." (underlining added).

17. In *John Entwistle*, after reciting the usual test (as described in *K-Mart*), the Board went on to comment that these criteria should not be "followed inflexibly". The Board remarked that the request for reconsideration in that case did raise "significant issues of Board policy" and for that reason, it would embark on a reconsideration inquiry notwithstanding the fact that the applicant's reconsideration request did not meet the usual criteria.

18. In my view, the Board's decisions in *John Entwistle* and *Imperial Tobacco* do not indicate an expansion of the test described in *K-Mart*. Rather, they recognize that a statutory grant of discretion

may be structured but not fettered. This means that in some cases, the discretion may be appropriately exercised, *despite* the fact that an applicant seeking to invoke the discretion has not squarely brought itself within the four corners of the test described in the jurisprudence.

19. This does not dilute the Board's concern that reconsideration should not merely be another opportunity to re-argue a case. Significant private and public resources are committed to litigation when matters go before the Board. Following litigation, parties make decisions and choices in the collective bargaining process which are based on decisions of the Board. For these purposes, certainty and finality are of critical importance. Where the Board does decide to reconsider a matter, it means that the litigation process may be repeated, with all of the attendant costs and uncertainties.

20. Where the Board does embark on a reconsideration inquiry, it should generally not be *just* because a matter turns on a question of significant Board policy or is *arguably* wrong. Most cases will in fact turn on such points. It is rare for cases to be decided where an alternative result is not arguable. This is why matters require adjudication in the first place, because reasonable people disagree on the appropriate solution to a problem. What should justify the reconsideration exercise is some considerable uncertainty around the policy, or an apparent absence of consideration or discussion of the policy in Board decisions, or apparent inadvertence or a failure to deal with issues or authorities which are at the heart of the matter in dispute.

21. Practically, and as a guidepost for parties, this approach means that the Board will examine requests for reconsideration on a case by case basis and that it may depart from the usual threshold test *if there are compelling reasons to do so*. Compelling reasons may include the fact that in the words of *Imperial Tobacco*, the earlier decision was "clearly wrong in law" or "inadvertently contrary to Board policy". Generally however, parties should not be permitted "another kick" at the case simply on the theory that the decision is arguably incorrect or touches on a matter of significant Board policy. There must be more to it than that, usually something about the Board's treatment of those issues or questions of law.

III

22. The grounds for reconsideration are set out generally in paragraph 6 of this decision. Each will now be examined in turn for purposes of determining whether as a threshold issue, they are appropriately a basis for reconsideration.

Factual Errors

23. The first ground for reconsideration is that the Board made three significant errors of fact. The applicant and intervenors argued that these errors are significant in that if not made, they would change the result. Firstly, that the Board erred in finding that the applicant's last day of active employment was September 23, 1996 rather than November 13, 1996. Secondly, that the Board erred in finding that there was some doubt about whether the respondent would understand that the applicant was pursuing rights under the OHSA. Thirdly, that the Board failed to deal with the culminating incident resulting in the applicant's dismissal.

24. Dealing with the suggestion that the Board erred in determining the last day of active employment, having heard the applicant's submissions on this issue I would agree that an error was made in this regard. It is not the case however that this error if not made, would have made any difference in the result. The decision did not turn in any way on this finding. This is not an appropriate basis for reconsideration.

25. The other two issues of what the respondent would have understood the applicant's concerns to be about, or whether the Board dealt in its decision with the culminating incident do not deal with errors of fact. Rather, these deal with whether the Board properly considered the various facts set out in the application. This concern really goes to the appropriateness of the Board's *analysis* of the facts as opposed to its *findings*. At the original hearing of the application, the applicant had an opportunity to address (and took that opportunity) what it was that the application should be taken to mean and how the Board should deal with the respondent's motion in that context. To that extent, on this point at least, the applicant wishes only to reargue these issues. He has nothing to bring to the debate which was not available to him when the issues were first considered.

26. For these reasons, the applicant's concerns about errors of fact are not sufficient to justify reconsideration.

Error in Declining to Hear Evidence about the Commission

27. The next basis for reconsideration is the suggestion that the Board erred in declining to hear evidence about the efficacy of the Commission.

28. The decision of May 21, 1997 at paragraph 11, records that the applicant wished to call expert evidence to establish that "...the Commission continues to fail to properly exercise its jurisdiction under the Code".

29. At paragraphs 69 and 70 of the earlier decision, the Board returned to this issue and indicated that it did not consider itself competent to determine whether the Commission was doing its job or not. The Board also suggested that concerns about the Commission's competence were best left to the courts or the legislature.

30. Dealing with the arguments in support of reconsideration on this issue, it cannot be said that the applicant or intervenors wish to do anything other than re-argue this point. The applicant argued that a decision of the Ontario Court (General Division) in *Kulyk v. Toronto (City) Board of Education* (1997) 24 C.C.E.L. (2d) 63 which was issued but not reported until after the decision of May 21, 1997 constitutes new evidence not reasonably available at the time of the earlier hearing. With respect, I cannot agree. There is really no issue that such a decision constitutes "evidence". Even if I accepted the suggestion that the decision was not available to the parties at the time of the hearing of the matter, it might only be an appropriate basis for reconsideration if the issue decided in the case was directly on point and binding. Having reviewed the case, it is fair to say that it may be of some general assistance, but it is not directly on point nor binding on the Board with respect to its discretion under section 50 of the OHSA or section 111(2)(e) of the Act. Taking the applicant's argument at its highest on this issue, I cannot say that if *Kulyk* had been before the Board when it decided the respondent's preliminary motion, that the result would have been different.

31. Are there other reasons to reconsider on this point? Was the decision "inadvertently contrary to Board policy" or "clearly wrong in law" to use the words of *Imperial Tobacco*? In my view neither of these concerns apply. It cannot really be said that there is a Board policy on the issue framed by the applicant here. In *Meridian Magnesium Products Limited* ("*Meridian*") [1996] OLRB Rep. Nov./Dec. 964 which is cited liberally in the decision of May 21, 1997, the Board did refer to material filed by the applicant in that case dealing with the efficacy of the Commission. This led to Board in that case to comment that it had "concerns" about the Commission, but no evidence was heard which led to findings of fact about whether the Commission does what it is supposed to do. The decision in this case not to hear the evidence proposed does not turn on a question of Board policy.

32. Dealing with the issue on a broader scale, there have been cases where the Board in exercising its deferral discretion under the Act has remained seized of an application pending arbitration proceedings. Presumably, this means that the Board may examine the conduct of those proceedings *after they have occurred* to determine whether they have substantially dealt with issues raised in Board applications. Where such deferral happens, the Board acts having regard to the statutory authority for arbitration proceedings set out in the Act. It would be inappropriate for the Board to determine in advance that a particular board of arbitration could not be trusted to carry out its statutory mandate.

33. Is the decision not to hear this evidence *clearly* wrong in law? It is a decision made in the exercise of the Board's broad discretion to consider evidence. Section 50(4) of the OHSA provides for the application in these proceedings of section 111 (2)(e) of the Act:

111.(2) Without limiting the generality of subsection (1), the Board has power,

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(e) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not;

34. This discretion permits the Board to have regard to evidence that it considers proper, regardless of whether it would be admissible under the rules of evidence. No authorities were relied upon by the applicant or intervenors on this point which would lead to the conclusion that the Board's exercise of discretion on this point was wrong. In these circumstances, it cannot be said that the decision to preclude this evidence was *clearly* wrong in law. Accordingly reconsideration on this point is unwarranted.

35. Despite the fact that I have not been persuaded that reconsideration is appropriate on this point, there are a number of observations which are in order. Firstly, it should be understood that the applicant's proposed evidence on this issue was for purposes of having the Board conclude generally, that the Commission has failed to exercise its jurisdiction under the Code and for that reason the Board should not defer to it where there is a concurrent jurisdiction as agreed by the parties in this case.

36. Secondly, the applicant has not brought a concurrent complaint to the Commission. Any determination by the Board as to how the Commission *might* deal with such an application (which is how it would be relevant to this case) is purely speculative.

37. Thirdly, it may be that the Board is competent to some extent to determine whether the Commission has dealt with a particular complaint in a manner which is similar to how it would be dealt with under section 50 of the OHSA. The Board lacks the human rights expertise however to sit in judgement of the Commission to determine whether it does its job under its home statute.

38. Finally, the courts have and will continue to exercise a type of supervisory jurisdiction over administrative agencies such as the Commission. There are well established prerogative remedies that may be invoked if a tribunal misconducts itself on the magnitude suggested here by the applicant. Indeed, it appears from the material filed by the applicant and intervenors in the reconsideration application that there is at least one pending action before the courts designed to deal precisely with this issue.

Did the Board Err in the Exercise of its Discretion Pursuant to Section 50 of the OHSA

39. This ground for reconsideration can be summarized (in my words) as comprising four alternative arguments all of which relate in part to the manner in which the Board's exercised its discretion under section 50 of the OHSA:

1. that it is inappropriate to “characterize” an application under section 50 of the OHSA to determine whether it should be deferred to another forum;
2. in the alternative, that the Board mischaracterized the application as being principally about issues of discrimination and harassment on the basis of race, rather than about occupational health and safety issues;
3. in the alternative, that the Board improperly applied the notion of deferral in a manner which is inconsistent with the use of deferral by the Board generally;
4. in the alternative that the Board should have at the least, remained seized of the matter pending any application to the Commission.

40. There is no serious suggestion that in dealing with this ground, the applicant has satisfied the threshold test for reconsideration as set out in *K-Mart*. The argument is made however that the Board’s earlier decision is wrong and turns on a significant issue of law and/or policy.

41. The applicant’s challenge on this point is really with the general analysis adopted by the Board in both *Meridian*, *supra*, and in the decision of May 21, 1997, which leads to the “characterization” of an application. The reasoning is that once a matter is characterized, it is possible to determine on a comparative statutory analysis which forum is best suited for the type of application and finally, that where a matter is really about human rights, the Board will not retain jurisdiction pending disposition by the Commission.

42. Given that the test in *K-Mart* for reconsideration has not been met, are there any compelling reasons in this case to reconsider the Board’s conclusions on this issue? In my view, it is difficult to say that there has been a failure to apply Board policy or that the decision is clearly wrong in law.

43. Perhaps surprisingly, the issue of how to deal with applications under section 50 of the OHSA which raise issues of human rights was not addressed by the Board before the recent decision in *Lyndhurst Hospital* [1995] OLRB Rep. Nov. 1371. Since then, the Board has addressed this issue in several other cases, *Meridian*, and in the decision in this matter dated May 21, 1997. In these two latter cases, after hearing full argument on this issue from experienced labour counsel, the policy and legal issues were thoroughly canvassed, discussed and then decided.

44. Dealing only with the issue of Board policy, it is not possible to conclude that the earlier decision is contrary to Board policy. It is most certainly not “inadvertent” as that term is used in *Imperial Tobacco*. With respect to the issue of whether the analysis adopted by the Board now in *Meridian* and in the earlier decision here, is clearly wrong in law or even just simply wrong, I cannot agree with the applicant. The statute provides a broad discretion to the Board under section 50 of the OHSA and there are no authorities relied upon by the applicant or intervenors which would suggest that the general approach being contested here is incorrect or wrong in law by any standard.

45. For these reasons, it is not appropriate to reconsider on this ground.

Does the Exercise of Discretion Breach section 15(1) of the Charter and sections 1, 9 and 11 of the Code

46. Section 15(1) of the Charter states:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

47. There have been many judicial pronouncements about the importance and purpose behind section 15(1) of the Charter. Most recently, Mr. Justice LaForest in *Eldridge v. British Columbia (Attorney General)* as yet unreported decision of the Supreme Court of Canada released on October 9, 1997, File No. 24896 at paragraph 54, succinctly described the two distinct purposes served by section 15(1):

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54. In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment — deeply ingrained in our social, political and legal culture — to the equal worth and human dignity of all persons. As McIntyre J. remarked in *Andrews, supra*, at p. 171, s. 15(1) “entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration”. Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups “suffering social, political and legal disadvantage in our society”; see *R. v. Turpin, [1989] 1 S.C.R. 1296*, at p. 1333 (per Wilson J.); see also Beverley McLachlin, “*The Evolution of Equality*” (1996), 54 *Advocate* 559, at p. 564. While this Court has confirmed that it is not necessary to show membership in a historically disadvantaged group in order to establish a s. 15(1) violation, the fact that a law draws a distinction on such a ground is an important *indiciu* of discrimination; see *Miron v. Trudel, [1995] 2 S.C.R. 418*, at para. 15 (per Gonthier J.) and at paras. 148-149 (per McLachlin J.), and *Egan v. Canada, [1995] 2 S.C.R. 513*, at paras. 59-61 (per L’Heureux-Dubé J.).

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48. Sections 1, 9 and 11 of the Code provide:

1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.

• • •

9. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

• • •

11.—(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and **bona fide** in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, the board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and **bona fide** in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

(3) The Commission, the board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

49. The applicant is described by himself and the intervenors as a “racialized” person. This means that he belongs to a group of persons in society (African-Canadians) who are routinely characterized by others on the basis of race. This characterization by others includes the attribution of personal traits and qualities based on assumptions about a particular race which bear no relationship to the person so characterized. Non-racialized persons are all others.

50. The applicant and intervenors argue that the Board’s characterization of matters as being about human rights or about health and safety, and deferral on that basis, will result in complaints under section 50 of the OHSA by racialized persons to go unaddressed. It is suggested that as this process will not be applied to persons who are not racialized, it amounts to discrimination on the basis of a prohibited ground.

51. The alleged discrimination is observed in this case according to the applicant and intervenors, by comparing the circumstances of racialized persons in section 50 complaints to others. Non-racialized persons who file complaints under section 50 of the OHSA is the comparator class.

52. The applicant and intervenors suggest that if racialized persons are obliged to have complaints which would otherwise be dealt with by the Board, go before the Commission, there is a breach of section 15(1) of the Charter and sections 1, 9 and 11 of the Code, whether or not the Commission is less effectual than the Board. For this reason, it is argued that it is not necessary to determine whether a complainant is disadvantaged before the Commission as opposed to the Board. The analysis is that “separate but equal” treatment before and under the law amounts to discrimination.

53. Is this a question which is an appropriate basis for reconsideration? Certainly, the issue was not argued by the parties when the Board considered the matter initially, nor was it addressed by the Board on its own motion. Although the ACLC did not participate in the initial hearing, the other parties had an opportunity at that point to raise and deal with the issue. It was clear to all at the time of the first hearing that the consequences of allowing the respondent’s motion would be to have the matter dismissed on the grounds that it was more appropriately before the Commission.

54. Although it is probably the case that there is no appropriate basis for reconsideration of this issue having regard to the Board’s jurisprudence, it has not been argued before, was argued fully at the reconsideration hearing and will in all likelihood be raised again if it remains unaddressed. For that reason, I will deal with it now.

55. Not only is the Board required to interpret legislation in a manner which is consistent with the Charter, but there is now little doubt that the Board is obliged to *exercise* its discretionary powers granted under statute in a manner which is consistent with the Charter (see *Eldridge v. British Columbia (Attorney General)*, *supra*). It is also the case that the provisions of the Code supersede those of the OHSA and apply equally to the exercise of the Board’s discretionary powers (see section 47(2) of the Code).

56. If through the exercise of the Board’s discretion under section 50(3) of the OHSA, racialized persons are being denied access to the provisions of section 50 where others are not, it will amount to a breach of both section 15 of the Charter and sections 1 and 9 of the Code.

57. There are a number of layers to the applicant’s argument. The first is that any health and safety complaint by a racialized person that includes an element of discrimination *will* be diverted to the Commission. The intervenor in its factum at paragraph 52 suggests that “a policy that excludes complaints which include a component of discrimination from redress under the OHSA constitutes a *prima facie* breach of sections 1, 9 and 11 of the Code and section 15 of the Charter”. I would agree with this proposition, but I do not agree that it describes what the Board has done in this case.

58. Complaints under section 50 of the OHSA by members of racialized groups are more likely to include aspects which touch on issues of discrimination on the basis of race. The underlying assumption by the applicant and intervenors goes further however. It is also assumed that if there is an element of discrimination and harassment on the grounds of race in the complaint, that the matter *will likely* be characterized as being about human rights and not about health and safety in the workplace. This is not the analysis used by the Board in this case nor in *Meridian*. Rather, the characterization is based essentially on the “pith and substance” of the complaint. If this approach is adhered to, complaints which possess a dimension of racial discrimination will in fact remain at the Board so long as that is not their principal character.

59. The next issue is whether racialized persons who file complaints under section 50 which are principally about discrimination on the basis of race, are similarly situated to non-racialized persons who file section 50 complaints concerning health and safety issues that do not involve acts of discrimination on the basis of race. The applicant’s theory is that the very act of experiencing discrimination in the workplace is inherently a health and safety issue that arises in the employment relationship. Further, the continuation of acts of discrimination past the first moment are acts of reprisal against the worker, particularly, where as in this case, the acts of discrimination are challenged by the worker. Why, asks the applicant, is this not appropriately dealt with by the Board, as it would with any other unsafe work assignment?

60. Acts of discrimination on the basis of race may amount to risks to health and safety. This is conceded by the employer in this case. This does not mean however that “race discrimination” and “health and safety” are identical categories. There are differences.

61. Our society appears to attach a particular significance to acts of discrimination on the basis of race. Such conduct is proscribed by section 15 of the Charter, and by various provincial, federal and international statutes and conventions. There is a wealth of Canadian and international jurisprudence, literature and other cultural treatments, which describe and document the experience and problems of race discrimination. In Ontario, the Code deals in a detailed and prescribed way with how these issues are to be regulated by law. The Code even provides in section 28 for a special branch of the Commission to have a particular focus on issues of race discrimination. As the factum of the intervenor ACLC documents, the historical underpinnings of race discrimination and the social conditions which continue to permit its practice, have little to do generally with issues of health and safety.

62. These general observations support the notion that there is a qualitative distinction to be made between issues of race discrimination and health and safety. If that is so, then complaints which deal *principally* with one or the other are not of the same nature. This in turn means that complainants in the two categories are not similarly situated. If not similarly situated, then differences in process, rights, remedies and enforcement as between the Board under section 50 of the OHSA, and the Commission under the Code, should not necessarily amount to a breach of section 15 of the Charter or sections 1, 9 and 11 of the Code. For these reasons, I do not see the two categories of complainants: “racialized applicants in matters principally about race discrimination” and “others in matters that do not deal with discrimination” as being similarly situated. In my view the two categories are qualitatively different and in fact require different treatment strategies. The applicant’s “separate but equal” argument only applies if there are two independent processes which are designed to achieve the same results. That is not the case here. The process before the Board is designed to deal with reprisals in the context of health and safety issues. The process under the Code is designed to deal with discrimination on the basis of race.

63. If I am wrong on this point (because the two categories of complainants *are* similarly situated), is the Board’s practice of deferral in breach of the Charter or the Code?

64. If persons in these two categories are similarly situated, then there is discrimination if persons are *disadvantaged* by having to seek redress before the Commission under the Code as opposed to the Board under section 50 of the OHSA. Part of the Board's reasoning in this case and in *Meridian*, is based on the conclusion that the Code provides a superior grid of rights, processes and remedies for dealing with the nuanced complexities of discrimination complaints. The Board's decision to "send someone to the Commission" flows from the conclusion that a complainant's interests will be more effectively served by the agency which is designed to deal with the particular nature of his or her concerns, rather than the agency which has a broader jurisdiction, a different expertise, and processes and remedies less tailored to issues of discrimination.

65. How can it be said that a complainant who is told to go to an agency which appears to be more capable of fully addressing his or her concerns is being put at a disadvantage or being denied a benefit? It can only be said if one is prepared to look beyond the comparative statutory analysis and to rank the relative performances of the two agencies who in this case may possess a concurrent jurisdiction.

66. This in turn takes the argument back to the issue of whether the Commission is in fact doing its job. For reasons provided earlier at paragraphs 27 to 38, I will not revisit this issue.

67. For these reasons, I find that the decision of the Board dated May 21, 1997 does not contravene the provisions of either the Code or the Charter. Accordingly, this application for reconsideration is dismissed.

2127-97-U Krista Beurling, Keith Bird, Brad Dieno, Karen Hall, Lori Hall, David Hooker, Elizabeth McLean, Blaine Scott and Carolyn Steingard, Applicants v. Christian Labour Association of Canada, **Univision Marketing Group Inc.**, Responding Parties

Abandonment - Bargaining Rights - Change in Working Conditions - Discharge - Discharge for Union Activity - Duty to Bargain in Good Faith - Duty of Fair Representation - First Contract Arbitration - Practice and Procedure - Settlement - Unfair Labour Practice - Group of employees filing unfair labour practice complaint alleging that employer had violated statutory freeze, breached the duty to bargain in good faith and had otherwise violated the Act by terminating certain employees for exercising rights under the Act - Employees also filing complaint alleging that their union had breached its duty to bargain in good faith and its duty of fair representation in how it responded (or failed to respond) to the employer's unfair labour practices and in how it communicated (or failed to communicate) with employees during its period of representation and in abandoning its bargaining rights - Board dismissing complaint alleging unfair labour practices that preceded union's certification for delay - Board finding that employees without standing to allege breach of statutory freeze or breach of duty to bargain in good faith - Board declining to inquire into certain matters previously settled - Board declining to dismiss certain discharge allegations for delay - Board, however, satisfied that applicants pleading prima facie case with respect to allegations of lack of vigilance and settling unfair labour practice complaint without consultation with affected employees and with respect to failure to take action when requested with respect to certain discharge and discipline of employees and with respect to wage proposal made to employer without consulting bargaining team and with respect to abandonment of bargaining unit - Board finding that union's failure to make application for first contract direction not amounting to prima facie breach of section 74 of the Act

BEFORE: *Mary Ellen Cummings*, Vice-Chair.

APPEARANCES: *Elizabeth McLean* for the applicants; *Elizabeth Forster*, *Peter Vander Kloet* for the trade union; *Bonnie C. Oldhum*, *Paul Baxter*, *Steve Hubley*, *Kevin Sherwin* for the employer.

DECISION OF THE BOARD; February 2, 1998

1. The applicants have made application pursuant to section 96 of the *Labour Relations Act*, 1995. They allege that Univision Inc. ("Univision" or "the Employer") has breached sections 17, 72, 76 and 86 of the Act and that the Christian Labour Association of Canada ("CLAC" or "the Union") has breached sections 17 and 74 of the Act. The application was filed with the Board in September 1997. Essentially, the applicants allege that Univision has breached the statutory freeze provisions of the Act in changing working conditions during the negotiation of a collective agreement; that Univision has breached the duty to bargain in good faith, and has committed unfair labour practices in terminating employees because of their involvement in organizing and participating in the trade union and its activities. With respect to CLAC, the applicants allege that it has breached its duty to bargain in good faith and has breached its duty of fair representation in how it has responded (or failed to respond) to the Employer's unfair labour practices, and in how it has communicated or failed to communicate with members of the bargaining unit throughout the period of its representation.

2. A day of hearing was convened to hear the Employer's and the Union's preliminary objections to the application, and to provide the Board an opportunity to give some direction and guidance to the parties as to how the hearing will unfold.

3. The allegations against Univision and CLAC fill 13 single spaced typed pages. For ease of organization, the Board will first set out the allegations made with respect to the Employer's conduct; then set out the objections made by the Employer, followed by the Board's decision. The Board will follow the same pattern with respect to allegations made against CLAC.

ALLEGATIONS AGAINST UNIVISION

I. Alleged Unfair Labour Practices that preceded certification

4. The applicants allege that the Employer committed unfair labour practices in July and August of 1996 by engaging in a course of conduct intended to undermine the Union's organizing campaign and intimidate employees. The Employer objects to the applicants' raising these issues now, given the passage of time, the ultimate certification of the Union, and the fact that at no time did the Union raise these concerns. The applicant responds that they want to raise the pre-certification conduct, not to seek a remedy with respect to it, but to give the Board a flavour of the Employer's conduct, and to indicate that its anti-union animus commenced at the start of the organizing drive, and continued throughout the time of CLAC's representation.

5. I have determined that I will not hear evidence about the alleged unfair labour practices that preceded the certification. In determining what evidence to hear, the Board balances such factors as relevance and prejudice. In this case, I have determined that the passage of time, which makes it hard for the Employer to defend itself, outweighs the value of the evidence. Therefore, the applicant's allegations in paragraphs 5 to 8 are struck.

II. Standing to allege a breach of the statutory freeze provisions

6. The applicants also allege that the Employer breached the statutory freeze provisions in section 86 by changing conditions of employment during the negotiation of the collective agreement.

The Employer objects to these allegations on two basis; first, that individual employees do not have standing to allege breaches of the freeze provisions and second, that any alleged breaches of the freeze provisions were the subject of an unfair labour practice complaint, which has been settled. Univision relies in part on the Board's decision in *Blue Line Taxi Ltd.* [1987] Apr. 470. In that decision the Board said at paragraph 8:

Based on the language of section 79 [now section 86], we are satisfied that it is the sole right of the trade union and not the individual employees whom the trade union represents who can make a complaint under section 79. Stated another way, it is the rights of the trade union and not those of the individual employees *per se* that are protected by section 79 of the Act. The trade union may, for any number of reasons, give consent or withhold consent to changes in working conditions or deal with the matters in collective bargaining. It is clear from the language of the section, moreover, that the employer owes no duty to the employees, except as the duty is owed vicariously through the trade union. However, the scheme of section 79 of the Act does not lend itself to the concept that an employee can complain about changes in terms and conditions of work, or conversely, that an employer is required to obtain the approval of its employees before making changes in terms and conditions of employment.

7. I agree. One of the features of the granting of representation rights is exclusivity. Accompanying the employer's obligation to bargain only with the trade union, and not with individual employees, is the employer's protection from claims from individuals. To conclude otherwise would place the employer in the difficult position of being obliged to bargain only with the union, but remain liable to the employees with respect to its bargaining conduct.

8. I therefore find that the applicants do not have the standing to allege a breach of the freeze provisions. Consequently, their allegations in paragraph 10 are struck.

III. Standing to allege a breach of the duty to bargain in good faith

9. The applicants have also alleged that the Employer breached its duty to bargain in good faith. Again, Univision submits that the applicants, as individual employees, do not have the standing to bring an allegation of bad faith bargaining against the Employer. Counsel submits that only the trade union can bring that complaint. Univision's counsel relies on the Board's decisions in *J. Abramowitz*, [1987] OLRB Rep. April 455 and *The Canadian General Electric*, [1980] OLRB Rep. August 1179. In *J. Abramowitz*, the Board wrote at paragraph 8:

Thus, the Board has consistently held in the context of the *Labour Relations Act* that employees do not have the status to assert that their trade union or their employer has violated the duty to bargain in good faith and make every reasonable effort to make a collective agreement... The bargaining duty imposed by those provisions is owed by the trade union to the employer, and vice versa.

10. I agree with those decisions and conclude that the applicants do not have standing to assert a breach of section 17. The reasons the applicants cannot bring an allegation of bad faith bargaining are the same as the reasons they cannot bring an allegation of a breach of the statutory freeze.

IV. Unfair Labour Practice complaints that have been settled

11. Univision argued that some of the unfair labour practice allegations which the applicants want to bring were settled and cannot now be re-litigated. The Employer submitted that the Union filed an unfair labour practice complaint on September 6, 1996, which raised some of the allegations that the applicants have made against the Employer in this proceeding. The unfair labour practice complaint was not settled until August 8, 1997. The Employer submitted that the settlement included the resolution of new issues that had arisen in the interim, including, for example, the termination of Mr. Bird. The Employer argued that the applicants are precluded from making allegations against the Employer with respect to events arising between the making of the unfair labour practice complaint on September 6,

1996 and its resolution on August 8, 1997 because those events were either addressed by the workplace parties or could have been, and therefore, it is too late for the applicants to raise them now. Counsel for Univision also noted that by the time the unfair labour practice complaints were settled, virtually all of the employees at issue had left employment so that while their issues were raised, they were now moot.

12. The Board generally does not permit parties to resuscitate the allegations in an unfair labour practice complaint once it has been settled. Otherwise, there would be little incentive for parties to settle and comply with the terms of their settlement. Further, although individual employees in a bargaining unit are not necessarily signatories to settlements of unfair labour practice complaints between the employer and the bargaining agent, they are bound to those settlements by virtue of section 96(7). Consequently, the applicants are precluded from bringing allegations of unfair labour practice complaints against the employer if those allegations were part of an unfair labour practice complaint that was brought by the trade union and then settled.

13. At this point, then, I must determine what alleged unfair labour practice complaints were encompassed in the complaint of September 6, 1996 and its resolution of August 8, 1997.

14. First, I reject the Employer's argument that the settlement must be deemed to include all unfair labour practices that could have been raised between September 6, 1996 and August 8, 1997. That is an overly broad conclusion to reach *absent* evidence that this was the result the parties intended. I am mindful of the Employer's argument that by the time the matter was settled, most of the employees had left, but I am not prepared to conclude, without evidence, that their departure from employment had an effect on how CLAC and Univision settled the unfair labour practice complaint.

15. However, I am prepared to conclude that the settlement constituted a resolution of all the allegations brought in the September 6, 1996 complaint because the first sentence of the Memorandum of Agreement quotes the Board file number, then reads "In full and final resolution of the above dispute". The unfair labour practice complaint reads as follows:

In support of its request the applicant relies on the following facts:

1. On 12 July 1996 the applicant began a campaign to unionize the employees of the respondent.
2. On 26 July 1996 the applicant applied to the Ontario Labour Relations Board for certification as the bargaining agent for the employees of the respondent.
3. On 8 August 1996 the employees of the applicant voted 17-9 in favour of having the applicant represent them as their bargaining agent.
4. On 22 August 1996 the Ontario Labour Relations Board certified the applicant as the bargaining agent of the employees of the respondent.
5. Since 26 July 1996 two union members have been demoted and one union member has been denied a promised promotion. The respondent was aware of the fact that these employees were union supporters.
6. Since 26 July 1996 the respondent has cut working hours on evening shifts. There was no sound business reason for doing so.
7. Since 26 July 1996 the respondent has instituted the unreasonable policy of forcing employees to sign in and out every time they go to the washroom.
8. The work of the employees of the respondent consists mostly of using telephones. Since 26 July 1996 the respondent has dramatically increased the amount of monitoring of the employees' telephone calls.

9. Since 26 July 1996 the respondent has reduced the number of working hours available to the employees. It has done so by hiring new employees and offering them some of the limited amount of time on the equipment.
10. Prior to 8 August 1996 the respondent stated that it would ensure that the application for certification "would never get to a vote." Subsequently the respondent vowed that it would "break the union."
11. Since 26 July 1996 three key union supporters have been given written "final warnings" by the respondent. There was no justifiable reason for such disciplinary action. These three employees are the most vulnerable in that, unlike other employees, they have no source of income other than their employment with a respondent.
12. The respondent's actions detailed in paragraphs 5 through 11 have created a working environment in which union members are harassed, bullied and intimidated, and employees' right to join the union of their choice and participate in its lawful activities are undermined.

16. The Union has indicated that the employees referred to in paragraph 5 are Lori Hall and Craig Strong; and the employees referred to in paragraph 11 are Keith Bird, Blaine Scott and Craig Strong. Consequently, I conclude that the alleged improper demotions of Lori Hall and Craig Strong in the summer of 1996 are issues that were settled. Similarly, I conclude that the alleged improper disciplinary warnings issued to Keith Bird, Blaine Scott and Craig Strong in the summer of 1996 were settled. I also note that in paragraph 35 of the application, the applicants acknowledge that the Union settled the termination of Mr. Bird in mid-August 1997, with the payment of \$1,500 to him. On that basis, I conclude that the dismissal of Mr. Bird has been settled and a complaint against the Employer with respect to that issue cannot be revived. Paragraph 13 of the application is struck.

17. I cannot go further and determine if any other alleged unfair labour practice complaints were included in the settlement without hearing evidence. Given the long passage of time between the laying of the unfair labour practice complaint and its resolution, it is possible that the Employer and the Union worked through other issues.

18. I direct the parties, principally the Employer and the Union, to lead evidence about what issues were encompassed in the August 8, 1997 settlement.

V. Timeliness

19. The Employer further argues that many of the unfair labour practice allegations the applicants want to bring relate to events in 1996 and early 1997, and the Board should not permit them to be brought against the Employer at this late date.

20. In a number of cases, the Board has exercised its discretion not to inquire into an unfair labour practice complaint because of delay. In the often cited case *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, the Board wrote:

20. It is by now almost a truism that time is of the essence in labour relations matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for

the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E. 3 L.A.C. 980 (Laskin)*; and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 [now 96] and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

21. In a recent decision, the Board further refined those considerations. In *William Gordon Switzer* (August 7, 1997), the Board said:

13. However, the fact that delays in resolving labour relations disputes can create tension and interfere in the proper functioning of a collective bargaining relationship, and that delay is presumptively prejudicial, is not necessary determinative of a motion for dismissal because of delay. The rights of affected individuals, such as section 74 applicants, must also be considered. Accordingly, the Board's response to motions seeking dismissal of applications under section 96 of the Act on the basis of delay is not a mechanical one. It is neither possible nor appropriate to draw up an exhaustive list of factors which the Board will consider when dealing with the motion to dismiss on the basis of delay. Each situation must be examined and determined according to the merits of a particular case, although the onus is on an applicant to explain what appears to be inordinate delay in making or pursuing a particular complaint (see *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420; *Sheller-Globe of Canada Limited, supra*, *Central Stampings Limited*, [1984] OLRB Rep. Feb. 215; *George Hinkson*, [1987] OLRB Rep. Oct. 1246; *John Kohut*, [1991] OLRB. Dec. 1367).

14. But speed is not the only objective, and justice and fairness require that someone who may be aggrieved have a reasonable opportunity to recognize this, to formulate a position and plan of action, seek legal advice or representation, and to actually plead and file a complaint. While there is no fixed rule, in cases which involve a loss of employment (particularly in an economy in which jobs are hard to come by), the rule of thumb developed by the Board is that it will generally not dismiss a complaint which makes out a *prima facie* case on the basis of delay which is less than one year long, except where a responding party demonstrates actual prejudice and there is no satisfactory explanation for the delay. As a general matter, where the delay asserted is less than one year, the onus is on the responding party to demonstrate actual prejudice (or perhaps some other good reason) sufficient to justify dismissing a complaint without a hearing on its merits. But where the delay is more than one year, the onus is on the applicant to provide a satisfactory explanation

for it. At that point it becomes incumbent upon an applicant to provide a good reason for the Board to exercise its discretion in favour of entertaining the application or complaint.

15. In approaching issues of delay in this manner, the Board attempts to balance the need to have labour relations dispute resolved in an expeditious manner against the rights of parties who may be inexperienced or unsophisticated in legal matters or unaware of their rights, to seek advice and to formulate and file a complaint, and also to give parties who appear to have delayed unduly an opportunity to explain the delay.

I have concluded that this is an appropriate set of considerations for the matter before me. Once the applicants discovered that CLAC had abandoned its bargaining rights, they moved quickly to bring this application. All the termination or alleged forced resignations that the applicants complain about occurred within one year of the making of this application. The applicants argue that they delayed only because they were trying to convince the Union to take appropriate action with the Employer. That argument has merit, and Univision has not established that it has suffered any particular prejudice by the delay. Therefore, the Board will not strike any of the applicants' allegations with respect to losses of employment on account of delay.

ALLEGATIONS AGAINST CLAC

I. Bargaining in bad faith

23. The applicants allege that the Union is in breach of section 17. For the reasons outlined above, I conclude that the applicants do not have standing to bring a complaint of a breach of the duty to bargain in good faith against CLAC.

24. The applicants allege that the Union has breached its duty of representation in a number of ways. Section 74 of the Act provides:

74. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

II. Bargaining unit parameters

25. The applicants allege that the Union breached its duty of fair representation in agreeing to a bargaining unit that was restricted to telemarketers, when some employees wanted a wider unit. Without determining whether such a decision could be a breach of section 74, the Board has determined that since the Union was certified in August 1996, the Board should decline to enter into an inquiry of this issue for reasons of delay. Therefore, the Board strikes paragraphs 25 and 26 of the application.

III. Responding to alleged unfair labour practice complaints

26. The applicants claim that the Union breached its duty of fair representation in its handling of the unfair labour practice complaint filed in September 1996. The applicants allege that CLAC did not consult the bargaining unit members about the contents of the application; was not vigilant in following its progress to hearing at the Board; and settled it without consultation with the members of the bargaining unit.

27. I have decided not to inquire into the Union's conduct around the preparation of the unfair labour practice complaint, because of the passage of time. However, I am satisfied that the applicants have pleaded a *prima facie* case of a breach of section 74 with respect to the allegations of lack of vigilance and settling the complaint without consultation.

IV. Responding to alleged discipline, terminations and forced resignations

28. The applicants allege that the Union did not take action when requested with respect to the termination of Carolyn Steingard; discipline of Lori Hall; the resignation of Krista Beurling and the dismissal of Keith Bird. In addition, the applicants allege that the Union settled the termination of Mr. Bird without consulting him.

29. I have concluded that the applicants have pleaded a *prima facie* breach of section 74, but barely. At the time of these alleged terminations, discipline and resignations no collective agreement was in place. In fact, the Employer and the Union never concluded a collective agreement.

30. Consequently, the typical action a union would take, filing a grievance, was not available. Practically speaking, if the Union wanted to seek the reinstatement of these employees, it would have to bring an unfair labour practice complaint before the Board. And the Union would have succeeded only if the Board was satisfied that there was some anti-union animus in the behaviour of the Employer.

31. The Board ruled in *Canadian Union of Public Employees*, [1981] OLRB Rep. June 623, that trade unions have a duty to fairly represent employees with respect to unfair labour practice complaints. The Board wrote:

26. This appears to be the first time that the Board has been faced with a complaint alleging that a union has violated section 60 [now section 74] of the Act by failing to file a section 79 [now section 96] complaint with the Board on behalf of an employee. I am satisfied, however, that the representation of employees in situations where a section 79 [now section 96] complaint might provide an employee with a remedy fall within the ambit of section 60 [now section 74]. A bargaining unit employee who has lost his job because of an employer's violation of *The Labour Relations Act* is entitled to the same type of representation by a trade union as is an employee discharged contrary to the provisions of a collective agreement. Indeed, it is hard to imagine an employee who has a stronger claim to his union's assistance than an employee whom it appears may have been terminated because of his support for the union.

27. This is not to say that a trade union is under a legal obligation to file a section 79 [now section 96] complaint on behalf of every employee who feels he has been discharged or otherwise discriminated against by his employer because of his union activity. However, the union is under a duty to consider the advisability of doing so, and to do so in a manner that is not arbitrary, discriminatory or in bad faith. In the instant case, it is not alleged that Mr. Backs acted in bad faith or in a discriminatory manner. It is, however, contended on behalf of Mrs. Hebert-Vaillant that Mr. Backs acted arbitrarily in the sense that he failed to put his mind to the matters relevant to the possible success of a section 79 [now section 96] complaint.

32. Consequently, in assessing the Union's conduct, I am looking to determine if it acted arbitrarily, discriminatorily or acted in bad faith in failing to bring unfair labour practice complaints with respect to the loss of employment of Beurling, Steingard and Bird. The applicants will not succeed before me if all they can argue is that the Union should have done "something" about the loss of employment. Practically speaking, the Union had few options and its conduct must be assessed within that context.

33. In arguing that the applicants had not made out a *prima facie* case of breaches of section 74 with respect to the way CLAC acted or did not act, counsel often referred to the Union's response. She argued, for example, that some of the employees did not ask for the Union's help, so the Union cannot be faulted for failing to intervene. That is very relevant to a hearing on the merits of these allegations. But in deciding whether the applicants have pleaded a *prima facie* case, it is appropriate for me to look only at the application.

34. The applicants' allegation that the settlement of the termination of Mr. Bird was made without consultation with him pleads a *prima facie* breach of section 74.

V. Making a wage proposal without consultation

35. The applicants allege that CLAC made a wage proposal to Univision without consulting with the bargaining team. I conclude that the applicants have pleaded a *prima facie* breach of section 74.

VI. Failure to make application for a first contract direction

36. The applicants allege that the Union failed to make an application to the Board for direction of a first contract arbitration. In their pleadings, the applicants acknowledge that CLAC considered the option, sought legal advice, ultimately concluded that an application was unlikely to be successful, and advised the applicants of that decision. The Board concludes that the applicants have failed to plead a *prima facie* case of a breach of section 74. In other words, even if all those allegations are true, they do not amount to a breach of section 74 of the Act. Nowhere is it alleged that the Union's decision not to make an application for direction of first contract arbitration was arbitrary, discriminatory or made in bad faith. In fact, the applicants concede that the Union considered their request, sought legal advice, and then made a decision not to proceed with the application. A union has a right to make a decision in bargaining that some employees do not agree with. As a result, the Board strikes paragraphs 40 to 43 of the application.

VII. Abandoning the bargaining unit

37. The final area the applicants complain about concerns the Union's decision in August 1997 to abandon the bargaining unit. The applicants allege that an employee circulated a petition, against the Union, and on the strength of that, CLAC conducted an informal (that is, not Board sanctioned) vote to determine if the employees in the bargaining unit wanted the Union to continue to represent them. The Union then decided, based on the results of the vote, to abandon its representation rights, and so informed the Board on August 8, 1997 that the Union no longer represented the bargaining unit. The applicants take issue with the way the informal vote was conducted, and allege that the Union was in breach of its duty of fair representation in abandoning the bargaining unit.

38. This is a novel allegation. Can a trade union breach its duty of fair representation by abandoning its bargaining rights? Since it appears that this question has not been answered by the Board before, I am not prepared to find that the applicants have failed to plead a *prima facie* breach of section 74.

39. To ensure there is no confusion, my conclusions that the applicants have pleaded a *prima facie* breach of section 74 of the Act means only that the allegations *if proven* would constitute a breach of section 74. At this point *nothing* has been proven.

40. Now that the parties have a better understanding of what matters will be proceeding, a Labour Relations Officer may be able to assist the parties to avoid or shorten what is certain to be a lengthy hearing. I hereby direct that a Labour Relations Officer be appointed to meet with the parties.

41. I anticipate that the first day of hearing will consist of evidence from Univision and CLAC around what issues were included in the August 8, 1997 settlement. After the Board has ruled on that issue, Univision will lead its evidence first, since it bears the onus of proof pursuant to section 96(5). The applicants will then lead all of their evidence, with respect to both the unfair labour practice complaints against Univision and the breach of the duty of fair representation complaints against

CLAC. CLAC will lead its evidence last. Once the Labour Relations Office has met with the parties, all will be in a better position to advise the Registrar of the number of days needed to complete the case.

1704-97-JD Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. Labourers' International Union of North America, Local 183, Labourers' International Union of North America, Local 837, Labourers' International Union of North America, Local 506, Labourers' International Union of North America, Ontario Provincial District Council, **Well-Bur Construction Ltd.**, and Granville Constructors Ltd., Responding Parties

Construction Industry - Jurisdictional Dispute - Carpenters' union and Labourers' union disputing assignment of carpentry portion of concrete forming construction work at project in Barrie - Board not accepting submission that arrangement between contractor and Labourers' union violating section 162 of the Act - Board also rejecting relevance of 1991 "Peace Treaty" between Labourers' Local 183 and Carpenters' Local 27 where disputed work performed by members of Labourers' Locals 506 and 837 - Board confirming assignment to members of Labourers' union

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. Knight* and *G. McMenemy*.

APPEARANCES: *David McKee* and *Walter Tracogna* for the applicant; *A. Minsky* and *R. Lotito* for Local 183; *John Moszynski* and *A. Camara* for Local 506; *John Moszynski* and *N. Schibeta* for Local 837; *John Moszynski* for Labourers' International Union of North America, Ontario Provincial District Council; *C. Peterson* for Well-Bur Construction and Granville Constructors.

DECISION OF THE BOARD; February 9, 1998

I. Introduction

1. This is an application concerning a work assignment which was filed with the Board pursuant to section 99 of the *Labour Relations Act, 1995* (hereinafter "the Act"). A consultation was held with the parties on December 5, 1997. At that time, submissions were entertained by this panel of the Board regarding a work assignment made by Well-Bur Construction. We have determined that we can decide this dispute without a formal hearing, in accordance with section 99 of the Act.

2. This application comes before the Board in somewhat unusual circumstances. The work in dispute is defined by the applicant (hereinafter referred to as "Local 27") as "the carpentry portion of concrete forming construction work" on the Barrie Water Pollution Control Centre, Plant Effluent Quality Upgrade project in Barrie, Ontario. Although the written submissions of the responding parties took issue with the manner in which the work in dispute was described, at the consultation none of the responding parties pursued that argument.

II. Background Information

3. Some background information is important to place this proceeding in context. On May 15, 1991, four trade unions entered into an agreement with respect to work jurisdiction - Local 27, Labourers' International Union of North America, Local 183 (hereinafter "Local 183"), International Union of Operating Engineers, Local 793, and The Formwork Council of Ontario. This agreement

(known colloquially as “the Peace Treaty”) has the effect of dividing up certain work as between Local 27 and Local 183 in a defined geographical area (which includes Simcoe County). For the purposes of this proceeding, it is sufficient to observe only that section 3 of the Peace Treaty provides that “the carpentry portion of concrete forming construction work” on most projects in the ICI sector of the construction industry is to be performed exclusively by members of Local 27 employed under the Carpenters’ Provincial ICI agreement.

4. Moving forward to April, 1996, at that time Granville Constructors Ltd.(hereinafter “Granville”) was awarded the upgrade project at the Barrie Water Pollution Control Centre. The applicant asserts that the project was one in the ICI sector of the construction industry. Concrete forming work commenced on the project in September, 1996. That work was subcontracted by Granville to Well-Bur Construction Ltd. (hereinafter “Well-Bur”). Local 27 became aware of the subcontract and further became of the belief that members of Local 183 had been assigned “the carpentry portion of the concrete forming work” on the project, in violation of the terms of the Peace Treaty. Accordingly, it invoked a provision of the Peace Treaty which permitted for arbitration of disputes under that agreement.

5. The arbitration was scheduled for March, 1997. Prior to proceeding to arbitration, Local 183 satisfied Local 27 that none of its members had, in fact, been on site at the Barrie project. In fact, it became clear that members of Labourers’ International Union of North America Locals 506 and 837 (hereinafter “Local 506” and “Local 837”, respectively) had performed the work in question. Although there was some confusion as to whether the work was performed pursuant to the Labourers’ Provincial ICI agreement or The Formwork Council agreement, it appears now that all parties agree that the work on the Barrie project was performed pursuant to the former agreement, and not the latter one.

6. As a result of the information garnered by Local 27 in the course of preparing for the arbitration under the Peace Treaty, the arbitration was adjourned *sine die*, and Local 27 has filed this proceeding at the Board. Local 27 asserts that its members ought to have been assigned the work in dispute. Furthermore, it asserts that the arrangement between what it describes as “the Labourers’ Union” and Well-Bur is contrary to section 162 of the Act, which reads as follows:

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- (1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.
 - (2) Subject to sections 153 and 161, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers’ organization, group of employers’ organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

III. Decision

7. As has been noted on innumerable occasions, when determining a jurisdictional dispute complaint the Board considers all of the factors relevant to the proper assignment of the work. As a general observation, the Board has historically given consideration to certain factors which include the following:

- (a) employer practice and preference;
- (b) area practice;
- (c) trade agreements;
- (d) collective agreement obligations;
- (e) trade union constitutions;
- (f) skill, training and safety; and
- (g) economy and efficiency.

In any particular case, one or more of these factors may be of special significance, and will be given greater weight than other factors. To a greater or lesser extent, all of the parties to this proceeding addressed the applicability and weight of these factors in their written and oral submissions.

8. Considering, first, the question of collective bargaining relationships, it was the submission of Local 27 that neither it nor “the Labourers’ Union” had any relevant collective agreement with Well-Bur that covered the work in dispute. Local 27 conceded that it has no collective bargaining relationship at all with Well-Bur. Well-Bur is bound to the Labourers’ Provincial ICI collective agreement (through a “tie in” agreement dated February 18, 1991). However, the Labourers’ Provincial ICI collective agreement governs only “construction labourers”, which is evident from Article 1.01 of that collective agreement. It is the submission of Local 27 that the Labourers’ Provincial ICI agreement does not cover “carpenters and carpenters’ apprentices”, and may not lawfully do so, having regard to section 162 of the Act, and the Labourers’ employee bargaining agency designation dated September 30, 1983. Counsel for Local 27 notes that the only way that “the Labourers’ Union” can lawfully represent carpenters and carpenters’ apprentices performing ICI work is by way of the Formwork Council Agreement. Here, it is conceded that the work in dispute was not performed under that agreement. The result, according to Local 27, is that there is really no relevant collective agreement relationship which governs the assignment of the work in dispute.

9. Not surprisingly, opposing counsel viewed the matter quite differently. We do so as well. As was pointed out by counsel for Local 183, the Board has stated, on many occasions, that although the Labourers’ International Union of North America or one of its affiliated local unions cannot represent carpenters and carpenters’ apprentices in the ICI sector of the construction industry, any one of those entities can represent “construction labourers performing carpentry work” in that same sector of the construction industry (see, for example, *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305, at para. 22 and 23; *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254, at para. 30; and *Ellis-Don Limited* (Board File 1754-95-JD, unreported decision dated July 18, 1996)). In the latter decision, the Board made the following observations:

- 48. Both carpenters and labourers perform the work that is the subject of the jurisdictional dispute. The fact that a labourer performs work also performed by a carpenter does not make the labourer a carpenter or vice versa. The fact that the Labourers inserted the word “carpenter” front of the form-builder classification does not make a construction labourer into a carpenter or change the scope clause to include carpenters ...
- 49. Because the Labourers’ or any other trade union performs work that is also performed by another trade union as part of its recognized work function it does not extend bargaining rights for this other trade or craft. As the Board has said in *Ellis-Don Limited*, *supra*, and *Gisar Contracting Limited*, *supra*, the use of the term “formsetter” or “form-builder” does not create a “carpenter” or a “labourer”. Adding the word “carpenter” in front of the classification of “formsetter” or “form-builder” cannot expand the scope of all construction labourers of the collective agreement to include all carpenters. On that basis any parties to a collective agreement could negotiate various classifications within the overlap area of certain trades and claim bargaining rights for other trades or crafts....

10. We agree. The work in dispute in this proceeding is not particularized, but it cannot be disputed that what can be described as “the carpentry portion of concrete forming work” in the ICI sector of the construction industry has been performed, historically, by both labourers and carpenters. This does not lead to the conclusion, however, that section 162 of the Act has been violated. Neither Local 506, 837 or 183 purports to represent carpenters and carpenters’ apprentices in the ICI sector of the construction industry, but rather construction labourers (or “formworkers”) in that same sector. Representation of the latter group by Locals 506, 837 and 183 is entirely within the scope of section 162 of the Act. The fact that “construction labourers” perform work that “carpenters and carpenters’ apprentices” also perform cannot lead to the conclusion that section 162 of the Act has been violated.

11. In the result, then, there *is* a collective agreement relationship between Well-Bur and Locals 506 and 837 that covers the work in dispute. There is no such agreement between Local 27 and Well-Bur. This is an extremely strong factor in favour of the assignment of the work in favour of Locals 506 and 837.

12. Turning next to the criterion of trade agreements, counsel for Local 27 relied upon the Peace Treaty referred to above as a document of significance. The difficulty with Local 27’s position is the simple fact that neither Local 506 nor Local 837 is a signatory to or bound by that document. To the extent that it is asserted that Local 183 has caused the work in dispute to be assigned to sister locals to avoid the provisions of the Peace Treaty, a jurisdictional dispute proceeding is not the proper forum for determination of that question. In the result, there is no relevant trade agreement which speaks to the work in dispute.

13. The employer’s practice in assigning the work in dispute within the province is to utilize members of various locals of the Labourers’ International Union of North America. The brief filed by Well-Bur identifies five prior projects of a similar nature performed throughout Ontario that were completed by members of various locals of the Labourers’ International Union of North America. It is not clear if the previous projects were performed pursuant to the Formwork Council Agreement or the Labourers’ Provincial ICI agreement. Accordingly, the lack of prior complaint by Local 27 (or a sister Carpenters’ local) is not necessarily significant. However, what is clear is that, at the very least, the work in dispute has been completed by Well-Bur at five prior projects of a similar nature utilizing members of Labourers’ local unions. On balance, this factor favours the Labourers’ as well.

14. We have considered the material speaking to area practice which was filed with the Board. The Barrie project is located in Board Area 18. Accordingly, the area practice to be considered by the Board is that of contractors in Board Area 18. There are no factors present to suggest that area practice beyond that in Board Area 18 has any relevance. The materials filed by Locals 506 and 837 establish that the overwhelming practice in Board Area 18 is to utilize non-unionized labour to perform the work in dispute. At best, Local 27 has established with its area practice materials that on 7 identifiable projects the work in dispute was performed by members of Local 27 in this Board Area. Counsel for Locals 506, 837 and 183 conceded that the area practice evidence established that Local 27 had an edge in this category, but only marginally, as Local 27 does not have the predominant practice in the area. We agree with this assessment.

15. In our view, the factors of trade union constitutions, skill and ability and economy and efficiency are not determinative to this proceeding and need not be addressed.

16. In the result, the Board has considered all of the factors identified above. In our view, the overwhelming weight of those factors favours the assignment that was made by Well-Bur in the circumstances, and we therefore confirm that assignment.

2696-96-R United Brotherhood of Carpenters and Joiners of America, Applicant v. Westinghouse Electric Corporation, Westinghouse Canada Inc., Responding Party

Bargaining Rights - Construction Industry - Collective Agreement - Related Employer - Sale of a Business - Board dismissing related employer and successor rights applications on ground that collective agreement relied on by union applies only in United States and creates no bargaining rights in Ontario

BEFORE: *Jules B. Bloch*, Vice-Chair.

APPEARANCES: *David McKee* and *Claude Cournoyer* for the applicant; *Robert Little*, *Amanda Hunter* and *Garry Sparks* for the responding parties.

DECISION OF THE BOARD; February 12, 1998

1. This is an application pursuant to sections 69 and 1(4) of the *Labour Relations Act, 1995* alleging that Westinghouse Canada Inc. ("Westinghouse Canada") is either a successor or a related employer to Westinghouse Electric Corporation ("Westinghouse America").

2. By way of background Westinghouse America executed a collective agreement with the United Brotherhood of Carpenters and Joiners of America ("Carpenters") in respect of periodic maintenance on turbines, generators and other associated mechanical equipment on December 9, 1971. This collective agreement has been re-negotiated from time to time. The most recent negotiations have produced a March 15, 1996 agreement.

3. In 1971, Westinghouse America was styled on the collective agreement, as the "Power Generation Service Division" Westinghouse. Over the years the name of the Westinghouse America divisions have changed and the March 15 1996 collective agreement is styled as "The Nuclear and Fossil Field Services Department of the Westinghouse Electric Corporation, Energy Services Divisions".

4. The section 69, and subsection 1(4) application arises from a Westinghouse Canada project at E.B. Eddy Papermill in Espanola, Ontario. A company called Rotating Equipment Services in Calgary, was performing work which the Millwrights believe was work covered by the March 15, 1996 agreement.

5. A grievance was filed by Local 1425 of the United Brotherhood of Carpenters and Joiners of America ("Local 1425") through the International Union alleging that Westinghouse America had breached the March 16, 1996 collective agreement between the "Nuclear and Fossil Field Service Department of the Westinghouse Electric Corporation, Energy Services Divisions and the United Brotherhood of Carpenters and Joiners of America".

6. In reply to the grievance, Westinghouse America asserted that the Espanola project was undertaken by Westinghouse Canada. Westinghouse America asserted that the collective agreement does not apply in Canada.

7. The Carpenters filed the instant application requesting that the Board declare that the Westinghouse companies are related or successor employers and that the collective agreement apply to Westinghouse Canada and the Espanola project.

8. The responding parties Westinghouse America and Westinghouse Canada raised a preliminary motion in respect of the section 69, subsection 1(4) application. They assert that the application does not make out a *prima facie* case under either section 69 or subsection 1(4). Westinghouse raised many different arguments in support of the preliminary motion. It is unnecessary to reproduce all of the submissions before me.

9. The Westinghouse Companies allege that the agreement referred to by the Carpenters in the section 69 or 1(4) application is an agreement that is limited to the United States of America and consequently there are no bargaining rights which could be preserved pursuant to a declaration under either section 1(4) or 69.

10. The Westinghouse companies submit that the agreement was to apply only in the U.S.A. For the collective agreement to apply to Canada, asserts Westinghouse, the agreement must refer to Canada or must have a clause that refers to some extraterritorial application. Further they state, in a collective agreement, where the geographic limitation of the scope clause is open-ended, one must assume that the collective agreement applies to the territory in which it was entered into. Westinghouse asserts that the collective agreement regime under which this collective agreement was fashioned is a statutory regime under the National Labour Relations Board in the United States. In their view, for a collective agreement to apply in an extraterritorial manner the agreement must either be used by the parties extraterritorially or the collective agreement must be specific about its extraterritorial application.

11. The Carpenters assert that the Carpenters union has locals in Canada and that the agreement on its face refers to all the locals without limitation. In the Carpenters' view, the collective agreement applies to all countries where the Carpenters have local unions.

12. Both parties agreed that, if we find that the collective agreement is not applicable in Ontario, then the application should be dismissed.

13. Neither party led evidence about negotiating history or past practice in relation to the intention of the parties or the application of the collective agreement outside the U.S.A.

DECISION

14. Article III of the collective agreement between the United Brotherhood of Carpenters Joiners of America and Nuclear and Fossil Field Services Department of the Westinghouse Electric Corporation Energy Services Division, Orlando, Florida 32826-2399 407-281-5520 states:

This Agreement covers all work as set forth in Article I, Recognition, assigned by the owner or customer to the Employer. This Agreement does not cover work performed by the Employer of a new construction nature.

It is clear on its face that the scope of work does not contain any geographic limitation. Nor can one find a geographic reference in any other part of the collective agreement.

15. This agreement applies to undefined union locals in undefined local areas, and refers to terms and conditions of local construction collective agreement in those areas. An example of this is Article VI(1) - Hours, Wages and Working Conditions. Section 1 states:

Section 1. The hourly rate of pay for employees covered by the terms of this Agreement shall be ninety percent (90%) of the hourly wage rate set forth in the building and construction collective bargaining agreement effective in the area where the work, in accordance with the provisions of this Agreement, is to be performed.

16. Article VI is a term in the agreement which states that the employees working under the agreement will receive ninety percent of the hourly rate set forth in the building and construction collective agreement effective in the area where the work is to be performed.

17. Section 7 of Article VI states:

Section 7. When twelve (12) hour shifts are worked, a second meal break shall be established after ten (10) hours have been worked and will be unpaid unless the applicable local collective bargaining agreement provides for same. When employees are required to work through a second paid meal break, one-half hour at the applicable overtime rate shall be added to the actual hours worked at the completion of the shift.

Article VII raises the problem of overlap between this agreement and local agreements in the construction industry with regard to a second meal.

18. Article VII Benefit Funds states:

Where a District Council or Local Union collective bargaining agreement, applicable in an area in which work covered by this Agreement is to be performed, makes provision for a lawful pension, health and welfare, vacation or other fringe benefit plan, the Employer and the District Council or Local Union shall execute a separate Memorandum Agreement for each plan, in the form provided in Appendix A attached hereto.

Payment of pension and/or health and welfare contributions for an employee's work in each locality in the applicable collective bargaining agreement for that locality, provided that the designated fund is signatory to a UBCJA National Reciprocal Agreement. In the event such pension and/or health and welfare fund is not signatory to the appropriate National Reciprocal Agreement, the equivalent contribution amounts shall be paid to the relevant fund identified in the collective bargaining agreement of the UBCJA affiliate in the employee's home area, or, in the event such home area fund refuses to accept that contribution, to the Carpenters Labor-Management Pension Trust.

There shall be no requirement for signatories to this Agreement to make payment to Industry Advancement Funds unless otherwise noted.

Article VII directs the pension, health, welfare and vacation and other fringe benefit plans are to be paid to the District Council or Local Union and this is to be done through a separate memorandum of agreement for each plan in the form provided in Appendix A.

19. The agreement sets up a scheme which "piggy backs" on local agreements. The agreement does not refer to any specific locals nor to any specific geographic area.

20. The March 16, 1996 collective agreement contains many unusual clauses. Some of these clauses would require amendment if they were found to apply in Ontario. Article II Union Security states:

Section 1. It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of The United Brotherhood in good standing on the effective date of this Agreement shall remain members in good standing and those who are not members on the effective date of this Agreement shall, on the eighth day following the effective date of this Agreement, become and remain members in good standing in The United Brotherhood.

Section 2. The provisions of this Article shall be effective in all jurisdictions where not prohibited by law.

Section 3. This Article shall be interpreted in accordance with the provisions of Section 8(a)(3) of the Labor-Management Relations Act of 1947, as amended.

The Union Security clause is different than what one would find in a typical Ontario agreement. It is written in a way to co-exist with “right to work” legislation in “right to work” states. In particular, Section 3 ensures that the union security clause be interpreted in accordance with the provisions of 8(a)(3) of the Labor-Management Relations Act of 1947, as amended. Counsel for both parties agree that the clause refers to the “right to work” “override” in states where “right to work” is in effect.

21. Article VI Hours, Wages and Working Conditions, Section 4:

Section 4. All work performed by an employee on Saturday shall be paid at one and one-half times the hourly rate established by the percentage ratio set forth in Section 1 above; Sundays or holidays recognized shall be paid for at double the hourly rate established in Section 1 above. Holidays **are** as follows:

New Year's Day	Labour Day
President's Day (Federal)	Thanksgiving Day
Memorial Day	Christmas Day
Independence Day	

It is clear, on the face of the article, that holidays like President's Day, Memorial Day and Independence Day, are included, however, the agreement does not include statutory holidays that one would normally find in an Ontario agreement.

22. Article VIII Compensation Insurance:

For all employees covered by this Agreement, the Employer shall carry Worker's Compensation Insurance, Social Security, and other protective insurance required by law.

This Article refers to American type compensation and benefits provided by American law. It does not mention any of the Canadian requirements in respect of insurance.

23. Article X Safety:

The employees covered by the terms of this Agreement shall at all times, while in the employ of the Employer, be bound by the safety rules and regulations as established by the owner, company or union and applicable safety laws. The company agrees to provide the union with copy of such rules and further to post in a conspicuous location such rules and regulations for the benefit of the employees covered by this Agreement. As a condition of employment, employees are required to report to work, beginning with the first day of employment, with the minimum required personal protective equipment, including but not limited to safety shoes that meet ANSI Z41-1991 standard “safety toe”, and prescription safety glasses with sideshields. If the prescription glasses are not approved safety glasses with sideshields, then safety goggles provided by the Employer work over the prescription glasses will be required. Regardless of the customer requirements, all minimum required personal protective equipment mentioned above, plus company provided personal protection equipment including but not limited to hard hats and safety glasses, must be work on all jobs. At the pre-job meeting the project manager will discuss all required personal protection equipment.

In respect of the “safety toe” referred to in the body of Article X one finds the standard to be ANSI Z41-1991. This is an American standard and there is no mention of its Canadian equivalent if any.

24. Article IV Grievances:

Section 1. In the interest of uninterrupted progress on any and all work covered by this Agreement, the parties hereby agree that there shall be no lock-out on the part of the Employer, and there shall be no strikes or stoppage of work called by The United Brotherhood, pending investigation of any dispute and attempts to bring about peaceful settlement as provided in sections 2, 3, and 4 of this Article. It is further agreed that The United Brotherhood shall not be subject to any liability for damages because of the action of any member of The United Brotherhood or any District Council or Local Union affiliated with The United Brotherhood.

Section 2. Should any dispute or grievance arise under any of the terms of this Agreement, the union and management mutually agree that an attempt will be made to settle any dispute or grievance at the local level between the Project Manager and steward. In the event that the dispute or grievance cannot be resolved at this level, an attempt shall be made by the Employer or his representative (Craft Labour Relations Manager) and the area (District Council or Local Union) representative designated by the United Brotherhood to resolve the dispute.

Section 3. If the parties in the local area do not succeed in resolving such dispute or grievance, notice shall be given promptly to the Employer and to the General President of The United Brotherhood. Upon receipt of such notice, the Employer and the General President shall each immediately designate a representative and notify the other party of the representative's name and address. The representatives appointed shall contact each other and make arrangements for a meeting to be held within ten days or at any mutually agreeable date and place for the purpose of resolving the issues involved.

Section 4. Disputes involving the application or interpretation of this Agreement which are not resolved between the two representatives referred to in Sections 2 and 3 above shall then be referred to an impartial third party, selected under the Rules of the American Arbitration Association, who shall, within thirty days or at any early mutually agreeable date and place, consider the issues involved in the dispute. Any decision reached by the Arbitrator shall be final and binding upon all parties for the duration of this Agreement. The Arbitrator shall have no authority to render a decision which would add to, detract from, or in any way alter this Agreement. The parties shall equally divide the cost of the Arbitrator.

Part of the grievance process contemplates the possibility of a work stoppage in the event that the parties are unable to come to a peaceful resolution about the grievance. This type of clause would be inoperative in Ontario.

25. The parties have, in other parts of the collective agreement, been cognizant of American law which might intervene in respect of certain clauses, they have not been cognizant of Canadian or Ontario law as it would impact on this agreement.

26. Another example of the parties failure to be cognizant of Ontario law, is found the termination clause. Article XIII Management Clause states:

In the exercise of its functions of management and subject to the terms of this Agreement, the Employer shall have the right to plan, direct and control the operation of all his work; hire employees; direct the working forces; assign employees to their jobs, discharge, suspend or discipline for proper cause; transfer, promote or demote employees; layoff employees because of lack of work or for other legitimate reasons; require employees to observe the Employer's rules and regulations not inconsistent with this Agreement; regulate the use of all equipment and other property of the Employer; decide the amount of equipment to be used and the number of workers needed; contract work anywhere and decide the methods of work and the source from which material and equipment is obtained; provided, however, that the Employer will not use these rights for the purposes of discrimination against any employee or the Union.

The agreement does not have a termination date, however, either party can terminate the agreement within 90 days. To be valid in Ontario the agreement would have to be deemed a one-year agreement.

27. The Ontario Labour Relations Board has previously dealt with the issue of an open-ended scope clause in an American collective agreement and its application in Ontario. *Rockwell International Corporation* [1981] OLRB Rep. June 780, involved an application for certification by the Millright District Council of Ontario United Brotherhood of Carpenters and Joiners of America on behalf of Locals 494, 1007, 1410, 1425, 1592, 1916 and 2309. In the context of the application for certification, the Progressive Lodge No. 126, International Association of Machinists and Aerospace Workers, asserted a valid collective agreement. The collective agreement on its face recognized the Progressive Lodge No. 126, International Association of Machinists and Aerospace Workers as the sole exclusive

bargaining representative of all machinists erectors and press erectors engaged in assembling, directing and dismantling, repairing and maintenance of printing presses and ancillary printing equipment outside the plant premises. The Board found that although the collective agreement contained an “open-ended” recognition clause, there were specific clauses within the collective agreement which applied to jurisdictions outside of the United States of America. As well, there was evidence that the collective agreement had been applied to press erectors employed by Rockwell International when they had been employed in the Province of Ontario.

28. At paragraph 21 and 22 the Board says the following about its view in respect of open-ended recognition clauses:

21. In most circumstances we would not be prepared to conclude that a seemingly open-ended recognition clause in a collective agreement signed with a trade union based outside of Ontario does in fact cover Ontario. However, in the instant case, on the basis of both the contents of the agreement itself and the viva voce evidence as to how it has been interpreted and applied over the years, we are satisfied that the scope of the collective agreement does in fact encompass the Province of Ontario. We are well aware of the potential for abuse if trade union locals based outside the province are free to sign valid collective agreements which encompass Ontario within their scope clause. However, we believe that the Act is capable for ensuring that such abuses do not occur. In this regard we would note in particular section 40 of the Act which provides that an agreement shall be deemed not to be a collective agreement if the employer has contributed improper support to the union, as well as section 52 which sets out a mechanism by which employees can challenge the validity of a collective agreement entered into by a trade union that has not been certified. In the instant case however, there has been no abuse and no improper employer support of Lodge No. 126. The current collective agreement was signed against the backdrop of a history of Rockwell International employing individuals in Ontario who were members of Lodge No. 126. In these circumstances, we are satisfied that the agreement is in fact a valid collective agreement.

22. We would note that although the collective agreement purports to be multi-national in scope, to the extent that it applies in Ontario, it is affected by the provisions of *The Labour Relations Act* and in that respect must be viewed as being in the nature of a province wide agreement. Thus, for example, during the “open period” of the last two months of the collective agreement, it would be open for another trade union to seek to displace Lodge No. 126 as the bargaining agent of press erectors employed by Rockwell International in Ontario, or for the employees themselves to apply to terminate the union’s bargaining rights. If successful, then pursuant to either section 48(1) or section 49(6) of the Act, the collective agreement would no longer have any force or effect in Ontario.

29. The approach taken by the Board in *Rockwell* is similar in nature to the approach taken by the Board in cases dealing with companies moving between provinces. In *ServVaas Rubber Company Inc.* [1986] OLRB Rep. Dec. 1780, a rubber plant was moved from Quebec to Ontario without advance notice to the union. The Quebec employees were fired and not rehired at the new Ontario location. The question was whether bargaining rights had an extraterritorial effect. The Board at paragraph 32 and 33 says the following:

32. Counsel for the applicant/complainant asserted, for various reasons, that the Montreal collective agreement, as a matter of law, covered the Cornwall location or, in the alternative, the bargaining rights of the union extended to that location. The Board does not agree. Certification of a trade union is a provincial matter, except for those enterprises regarded as falling within the federal sphere. In Ontario, for example, certification is granted to a bargaining agent for a defined geographic area, whether that be street address of a single plant or municipality or some other geographic configuration. The Board is not prepared to give “extra-territorial” effect to the bargaining rights of a trade union as a matter of law, that is, that once certified in one province or federally, those bargaining rights are “portable” across provincial boundaries or notwithstanding a change in the nature of the enterprise from the federal to provincial sphere (or vice versa): *MacLeans Magazine*, *supra*; *Labour Relations Board of New Brunswick v. Eastern Bakeries Ltd.* (1960), 26 D.L.R. (2d) 332 (S.C.C.); *Saint Paul University* [1972] OLRB Rep. July 729; *Bell Canada*, *supra*;

Durham Transport, supra; Wholesale Delivery Service, supra; Brotherhood of Railway Airline & Steamship Clerks, supra; Transport Labour Relations Association, supra. To grant such extra-territoriality, in the Board's view, would be contrary to provincial authority over labour relations as reflected in the various provincial labour relations statutes governing certification. (For this analysis, the Board need not deal with the case law elaborating on the limited federal sphere in labour relations). that is not to say that a union certified as bargaining agent in one province, for example, could not be granted voluntary recognition in another province and, thus, "continue" to hold bargaining rights. In that instant case, however, no such voluntary recognition was granted.

33. The Board considers that the bargaining rights of the applicant/complainant could apply to the Cornwall location only if the collective agreement itself covered that site. That question depends upon the scope clause of the Montreal collective agreement. Counsel for the applicant/complainant asserted that the scope clause should not be restricted to Montreal, that "street address" descriptions were commonplace and should not represent an intention to so delimit the collective agreement. Again, the Board disagrees. The instant case is readily distinguishable from *Rockwell International, supra*, where the Board found that the contents of the collective agreement and its interpretation over the years supported a conclusion that the parties intended an "open-ended" recognition clause. Here, there is no basis for importing such an intention. Assuming that, by operation of Quebec law, the collective agreement would have extended to company "relocations" elsewhere in Quebec, for the reasons already given, the collective agreement cannot bind the employer outside that province, except in the *Rockwell* circumstances, or, perhaps, as a matter of remedy for statutory violations (see also the cases cited in paragraph 32 above).

30. In *Crown Cork and Seal Company Limited* [1978] OLRB Rep. Sept. 809 at paragraph 12, the Board in exercising its discretion found that it was not prepared to apply an American collective agreement instead of an already existing Canadian collective agreement through the vehicle of section 1(4). In paragraph 12 the Board says the following:

12. The master agreement is specifically stated to be between Crown Cork and Seal Company Inc. (the parent firm) and the applicant. We were referred to nothing in the agreement which would indicate that it was meant to apply to a subsidiary of the firm which was operating outside of the United States. The applicant acquired its bargaining rights for the Canadian company's Concord employees by way of two separate certificates from this Board and those bargaining rights are currently reflected in two separate collective agreements. During the most recent negotiations both in the United States and Canada the applicant sought at the bargaining table to have the respondents voluntarily agree to alter this bargaining structure, but without success. We are of the view that section 1(4) of the Act should not be used in circumstances such as this to impose a new bargaining structure on an unwilling employer, particularly where it has not been shown that the existing bargaining structure is inappropriate or lacks viability. It should be noted further that it was not even alleged that the Canadian company was failing to fulfill its obligations under the existing bargaining structure, seeking to subvert existing bargaining rights, or somehow attempting to avoid the effects of any collective agreement which it had entered into. It is clear that the applicant is of the view that the employees of the Canadian company which it represents at Concord should be employed under the same terms and conditions as are the employees of the parent firm in the United States. Without seeking to detract from the motives which might underlie such a position, that is a matter for collective bargaining. For this Board to allow section 1(4) of the Act to be used as a means of importing the terms of U. S. negotiated collective agreements into Ontario would in effect mean that this Board would be imposing the terms of collective agreements upon Ontario based bargaining units rather than having them negotiated through free collective bargaining. In our view this runs counter to the general intent of the Act and is not a proper use for section 1(4). Accordingly we decline to treat the two respondents as constituting one employer for the purposes of the Act or to declare them to be one employer.

31. In my view, where a collective agreement is entered into in a jurisdiction outside Ontario and that agreement is silent about the geographic scope, there is a presumption that the collective agreement only applies to that jurisdiction. In order to rebut that presumption, clauses in the collective agreement must indicate an intention to apply extraterritorially. Alternatively, where there is an open-ended scope clause or recognition clause in a collective agreement, for that agreement to apply extraterritorially, the agreement must have been applied in the foreign jurisdiction.

32. In the case before me, the collective agreement is silent about any extraterritorial application. Further, there is no evidence that the parties intended that the agreement apply outside the U.S.A. nor is there any evidence that the agreement was applied outside the U.S.A.

33. I would dismiss the application because the collective agreement is not one that applies in Ontario. There are no bargaining rights to be preserved and consequently there is no *prima facie* case for either a section 1(4) or section 69 declaration.

COURT PROCEEDINGS

1044-96-R (Court File No. 336/97) International Union of Bricklayers and Allied Craftsmen, Local 10, Applicant v. **Bradleigh Construction Limited** and the Ontario Labour Relations Board, Respondents

Certification - Construction Industry - Employer - Judicial Review - Natural Justice - Union applying to represent bargaining unit of bricklayers purportedly employed by general contractor on application date - Board concluding that bricklayers employed by masonry subcontractor and not by general contractor - Board denying union application to amend certification application to substitute masonry subcontractor as named employer - Application dismissed - Application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court (General Division) (Divisional Court), Southey, Chilcott and Pardu JJ., February 6, 1998.

Southey J. (Endorsement): The Board's undertaking to base its decision upon the Union's assertions as to what was factually correct did not include an undertaking to accept the union's assertion as to the basic issue in dispute as to who was the employer on July 9/96. That was the issue to be determined.

The following facts were not in dispute:

- 1) the bricklayers were paid for their work on July 9 from a bank account of R. Doidge Masonry.
- 2) R. Doidge was directing the work of the bricklayers as foreman.

On these facts, despite the able argument of Mr. Richmond to the contrary, we are not satisfied that it was patently unreasonable to conclude that Bradleigh Construction Limited was not the employer on July 9/96.

There was no denial of natural justice, because the Board did base its decision on the undisputed facts.

In the final analysis the Union's complaint is with the inference drawn by the Board from those facts.

The application is dismissed with costs to the respondent Bradleigh Construction, hereby fixed at \$3,000.

2225-95-U (Court File No. 38/96) Mike Novic, Applicant v. Metropolitan Toronto Civic Employees' Union Local 43, Municipality of Metropolitan Toronto and the Ontario Labour Relations Board, Respondents

Discharge - Duty of Fair Representation - Judicial Review - Unfair Labour Practice - Applicant alleging violation of duty of fair representation through union's handling of his discharge grievance at settlement stage and at arbitration, as well as union's subsequent failure to apply for judicial review of arbitrator's award - Complaint dismissed - Application for judicial review dismissed by Divisional Court

Ontario Court (General Division)(Divisional Court), Coe, Corbett and Howden JJ., January 13, 1998.

Coo J. (Endorsement): The Application is dismissed. Costs to the union only fixed at \$2000.

0164-95-R; 0186-95-R; 0187-95-R; 0251-95-R (Court File No. 244/97) Power Workers' Union, CUPE Local 1000, Applicant v. Ontario Hydro, G.T. Surdykowski, OLRB, IBEW, Local 1788, IBEW Electrical Power Systems Construction Council of Ontario, IBEW Local 105, The International Brotherhood of Electrical Workers, Local 353, The IBEW Construction Council of Ontario, The International Brotherhood of Electrical Workers, Local 1687, Electrical Power Systems Construction Association and Electrical Contractors Association of Ontario, Respondents

Certification - Construction Industry - Judicial Review - Reconsideration - Trade Union - Power Workers' Union (PWU) seeking to displace International Brotherhood of Electrical Workers (IBEW) in several bargaining units - Board concluding that PWU not a construction "trade union" within meaning of section 126 of the Act and therefore not entitled to bring its certification applications - Applications for certification and request for reconsideration dismissed - PWU's application for judicial review dismissed by Divisional Court

Board decision reported at [1997] OLRB Rep. Jan./Feb. 82.

Ontario Court (General Division) Divisional Court, Coe, Corbett and Howden JJ., January 15, 1998.

Coo J. (endorsement): This is an application for judicial review of a decision of the Labour Relation Board, in which it was determined:

first, that the applicant had to be a trade union as defined in section 126 of the *Labour Relations Act*, before it could apply to be certified to represent certain Hydro workers who are all construction workers at Hydro,

second, that the applicant union did not meet the requirements of that definition.

The decision on both questions required and drew upon the core of specialized knowledge and experience possessed by the Board. The strong privative clauses in sections 114(1) and 116 of the Act recognize the specialized jurisdiction confided to the Board. The proper deference to be given to the Board is mandated by the 'pragmatic and functional approach' cases, including *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.

The appropriate standard to be applied to each of the Board decisions is whether the decision reached was patently unreasonable. It is important in this case not to categorize as jurisdictional the performance of difficult constituent elements of the Board's clear responsibilities.

Not meaning to over-simplify the extensive submissions made on behalf of the applicant, the key one is that the construction workers had a right to have represent them, pursuant to section 2(1) and section 5 of the Act, a union falling within the words only of section 1(1). It is urged that nothing in the language of the Construction Industry part of the Act, commencing with definitional section 126, which included a limiting definition for trade union, and nothing in the recent legislative extension of the reach of that definition to the whole construction industry legislative package, including the certification section, 158, changes that right. It is put that there were and continue to be alternative routes available for certification of unions for representation of construction worker units. That interpretive approach was rejected by the Vice-chair in his decision.

The Vice-chair of the Board, in his very lengthy reasons, made careful and extensive reference to and analysis of:

- the principles of interpretation which played their part in the process,
- the factual and historical background,
- concepts having special relevance to the construction industry and its employees,
- the history of the *Labour Relations Act* and in particular the construction industry portion,
- the purposes and scheme of the Act and the policy issues that were involved in the interpretive process,
- the way in which boards in the past had dealt with the problems, and
- the impact of the recent amendment of section 126 of the Act.

In our view the decision made on the first issue was peculiarly and ideally one to be made by the Board and there is not support for the proposition that the decision was patently unreasonable.

On the second issue—whether the applicant met the requirements of the definition in section 126—we are of the same view with regard to the decision of the Board and the test to be applied by us in this review, and for essentially the same reasons.

The Vice-chair reviewed against the background of the Board's special knowledge and expertise, all the evidence and materials placed before him over the course of a lengthy hearing on the subject of what the qualities were that made a union one "...that according to established trade union practice pertains to the construction industry". His analysis was logical, careful and detailed, as was his conclusion. There is nothing in the totality of his reasoning and conclusions that we could possibly label patently unreasonable. Indeed, it is our view that his decision on this point was correct.

We understand the points raised in regard to the second issue by counsel for the applicant, including those about his client's constitution and the fact that there are about 2700-4000 construction workers in the unit or units it has represented for many years under the general certification provisions of the Act. About these and related factors and arguments, the Vice-chair commented at length in arriving at his interpretive and judgmental conclusion. He found that the applicant did not meet the requirements of section 126. We cannot conclude from a review of the decision and the supportive reasons that the decision could be categorized as patently unreasonable, or that the rejection of the approach urged on behalf of the applicant made it so.

This application will be dismissed.

As for costs to be paid by the applicant, Mr. Minsky's clients IBEW et al. will be entitled to \$7,000.00. Mr. Thompson's client Electrical Contractors Association of Ontario will be entitled to \$5,000.00. There will be no other order as to costs.

0608-94-U (Court File No. 197/96) Champuben Patel, Applicant v. Ontario Labour Relations Board, Amalgamated Clothing and Textile Workers Union, Local 551, C.L.C, AFL-CIO and Levi-Strauss & Co. (Canada) Inc., Respondents

Discharge - Duty of Fair Representation - Judicial Review - Reconsideration - Unfair Labour Practice - Applicant alleging that union's decision not to refer discharge grievance to arbitration arbitrary and unlawful - Board satisfied that union did everything reasonable in the circumstances and that its actions not arbitrary - Complaint dismissed - Reconsideration application dismissed - Application for judicial review dismissed by Divisional Court

Decisions of the Board dated June 19, 1995 and December 19, 1995 not reported.

Ontario Court (General Division) Divisional Court, Hartt, Coe and Howden JJ., January 22, 1998.

Hartt J. (endorsement): Application is dismissed.

This is an application for Judicial Review of two decisions of the O.L.R.B. namely that dated June 19/95 in which the Board dismissed the applicant's complaint of breach of fair representation against the union and, secondly, the decision dated Dec. 19/95 in which the Board dismissed the applicant's request for reconsideration of its previous decision.

The matters substantive and procedural in this case were at the very core of the specialized jurisdiction of the Board and were in our view dealt with appropriately and properly. The decisions rendered were not unreasonable patently or otherwise.

At the outset of the hearing today the matter of delay was raised by the respondent Board. Judicial Review is an equitable and discretionary remedy and in the present case where the application was not perfected for over a year we would have exercised our discretion not to grant relief. On all grounds the application fails and must be dismissed.

Costs to the respondent union in the sum of \$2,000.00.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1997

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1434-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. North York Tile Contractors Limited (Respondent)

Unit: "all marble, tile and terrazzo, cement masons and resilient floor layers and their helpers and their respect apprentices, improvers and working foremen employed by North York Tile Contractors Limited in all sectors of the construction industry in the the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (30 employees in unit)

1457-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. Dama Tile Ltd. (Respondent)

Unit: "all employees of Dama Tile Ltd. engaged as marble, tile and terrazzo, cement masons and resilient floor layers and their helpers and their respective apprentices, improvers and working foremen in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (0 employees in unit)

2129-95-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Hamilton Carpet & Tile Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Hamilton Carpet & Tile Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Hamilton Carpet & Tile Inc. in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (1 employee in unit)

Bargaining Agents Certified Subsequent to Vote

1451-97-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Dave Good Plumbing & Heating, A Division of 524556 Ontario Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Dave Good Plumbing & Heating, A Division of 524556 Ontario Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Dave Good Plumbing & Heating, A Division of 524556 Ontario Inc. in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the

geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, and in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2

2343-97-R: University of Western Ontario Staff Association (Applicant) v. University of Western Ontario (Respondent)

Unit: "all employees of the University of Western Ontario in the City of London and all employees of the University of Western Ontario working in the University's Northern Outreach Program in Thunder Bay, Ontario, save and except the following: 1. Supervisors and those above the rank of supervisor; 2. Persons employed in a confidential capacity in matters relating to labour relations, which employees include all secretaries and/or administrative assistants in the Office of the President, which Office includes the Offices of the President, Vice-Presidents, Vice-Provost and Registrar, and Secretary of the Senate/Board of Governors; all secretaries and/or administrative assistants in the Office of Employee Relations; and the one personal secretary or administrative assistant to each of the following individuals: Senior Director of Human Resources; The Senior Director of the Financial Services Division; the Senior Director of the Physical Plant and Capital Planning Services; the Director of Libraries/Chief Librarian; the Senior Director of Information Technology Services; the Director of Institutional Planning and Budgeting; the Deputy Registrar; the Director of Pensions and Benefits; the Senior Director of Housing and Food Services; the General Manager of Food Services; and the Assistant Director of Operations and Maintenance, Physical Plant Department; 3. Security guards; 4. Employees in bargaining units for which any trade union held bargaining rights under the *Labour Relations Act* as of September 24, 1997; 5. Academic staff including faculty, and any other employee in respect of work performed teaching courses for credit or non-credit; 6. Post-Doctoral fellows; 7. Full-Time students of The University of Western Ontario; 8. Employees regularly employed for not more than 24 hours per week and students employed during their school vacation period; 9. Employees who are hired by The University of Western Ontario pursuant to a written individual contract of employment with a definite term of 8 consecutive months or less and who in fact work for The University of Western Ontario for 8 months or less in any period of 24 consecutive months; and 10. Employees in job classifications or salary grades eligible for membership in the Professional/Managerial Association at The University of Western Ontario prior to the Application for Certification dated September 24, 1997, or their subsequent equivalents" (947 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	947
Number of persons who cast ballots	768
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	592
Number of segregated ballots cast by persons whose names appear on voter's list	66
Number of segregated ballots cast by persons whose names do not appear on voters' list	110
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	429
Number of ballots marked against applicant	189
Number of ballots segregated and not counted	149

2566-97-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. The Board of Education for the City of North York (Respondent)

Unit: "all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of The Board of Education for the City of North York in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of The Board of Education for the City of North York in all sectors of the construction industry in

the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman” (4 employees in unit)

Number of names of persons on revised voters’ list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

2616-97-R: National Automobile, Aerospace, Transportation and General Workers’ Union of Canada (CAW) (Applicant) v. Till-Fab Ltd. (Respondent)

Unit: “all employees of Till-Fab Ltd. in the Township of Norwich, Ontario, save and except supervisors, persons above the rank of supervisors, office, clerical, sales staff and students” (29 employees in unit)

Number of names of persons on revised voters’ list	29
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	29
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	17

2757-97-R: Labourers’ International Union of North America, Local 183 (Applicant) v. The Cadillac Fairview Corporation Limited, Markville Shopping Centre (Respondent)

Unit: “all employees of The Cadillac Fairview Corporation Limited, Markville Shopping Centre in the City of Markham, save and except Supervisors, persons above the rank of Supervisor, office, clerical and sales staff” (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	3
Number of ballots segregated and not counted	2

2805-97-R: Northern Ontario Joint Council of the Retail, Wholesale and Department Store Union, District Council of the United Food and Commercial Workers International Union (Applicant) v. Low Down Productions (Respondent)

Unit: “all employees of Low Down Productions in the City of Thunder Bay, save and except owner/publisher and persons above the rank of owner/publisher” (2 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	2

2863-97-R: Christian Labour Association of Canada (Applicant) v. Enviro-Tech Plastics Inc. (Respondent)

Unit: “all employees of Enviro-Tech Plastics Inc. in the County of Essex, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (59 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	59
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	47
Number of spoiled ballots	1

Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	7

2882-97-R: Service Employees' Union, Local 210 (Applicant) v. 782750 Ontario Limited c.o.b. Downtown Bingo Country, Downtown Bingo and 712256 Ontario Limited c.o.b. Big "D" Bingo Emporium, Big "D" Bingo Emporium East (Respondent)

Unit: "all employees of 782750 Ontario Limited and 712256 Ontario Limited in Windsor, save and except supervisors and persons above the rank of supervisor" (112 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	112
Number of persons who cast ballots	94
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	89
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	61
Number of ballots marked against applicant	31
Number of ballots segregated and not counted	2

2887-97-R: Ontario Public Service Employees Union (Applicant) v. Thunder Bay Emergency Shelter Inc. (Respondent)

Unit: "all employees of Thunder Bay Emergency Shelter Inc. in the City of Thunder Bay, save and except Fundraising Coordinator, Administrative Assistant, students on placement from college or university, supervisor and persons above the rank of supervisor" (20 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	2

2893-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-CANADA) (Applicant) v. Norma Products of Canada Ltd. (Respondent)

Unit: "all employees of Norma Products of Canada Ltd. in the City of Windsor, save and except supervisors, those above the rank of supervisor, office and sales staff" (26 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	3

2915-97-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Mariposa (Respondent)

Unit: “all employees at The Corporation of the Township of Mariposa, save and except office and clerical staff, superintendents and persons above the rank of superintendents, Dog Control Officer, Recreational Director and Chief Building/By-Law Enforcement Officer” (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	11
Number of ballots segregated and not counted	4

2916-97-R: United Brotherhood of Carpenters and Joiners of America Local 494 (Applicant) v. Front Construction Industries Inc. (Respondent)

Unit: “all carpenters and carpenters' apprentices in the employ of Front Construction Industries Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Front Construction Industries Inc. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

2948-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Victoria Senior Centre Limited (Respondent)

Unit: “all employees of Victoria Senior Centre Limited, 100 University Avenue East, Cobourg, Ontario, save and except Manager and persons above the rank of Manager” (25 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	8

2987-97-R: Labourers' International Union of North America, Local 837 (Applicant) v. Janitorial Development Inc. (Respondent)

Unit: “all employees of Janitorial Development Inc. working at Allan Can at 369 Ferrie Street East (A Division of Trebor Allan Inc.) in the City of Hamilton, save and except supervisors and persons above the rank of supervisor” (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6

Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

3026-97-R: Canadian Union of Public Employees (Applicant) v. Canadian Mental Health Association - Niagara South Branch (Respondent)

Unit: "all employees of the Canadian Mental Health Association - Niagara South Branch in the Regional Municipality of Niagara, save and except Executive Director, Program Co-ordinator, office and clerical employees, and students engaged in co-operative education programs" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	3

3032-97-R: Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Applicant) v. Concord Confections Inc. (Respondent)

Unit: "all employees of Concord Confections Inc. in the Township of Vaughan, save and except supervisors, persons above the rank of supervisors, office, clerical, sales staff, drivers, quality control and persons regularly employed for not more than 24 hours per week" (263 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	263
Number of persons who cast ballots	250
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	250
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	201
Number of ballots marked against applicant	46

3081-97-R: Canadian Union of Public Employees (Applicant) v. The Toronto People with Aids Foundation (Respondent)

Unit: "all employees of The Toronto People with Aids Foundation in the Municipality of Toronto, save and except Executive Director" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1

3098-97-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Fairview Nursing Home (Ltd.) (Respondent)

Unit: "all employees employed at Fairview Nursing Home (Ltd.) in the City of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, registered and graduate nurses, persons regularly employed for more than 24 hours per week and persons covered by any existing collective agreement" (33 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27

Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	8

3109-97-R: Ontario Public Service Employees Union (Applicant) v. 753287 Ontario Ltd. c.o.b. as Ventures Group Home (Respondent)

Unit: "all employees of 753287 Ontario Ltd. c.o.b. as Ventures Group Home in the Town of Gananoque in the united counties of Leeds and Grenville, save and except Programme Supervisor and persons above the rank of Programme Supervisor" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	4

3127-97-R: Canadian Union of Public Employees (Applicant) v. The Redwood Shelter (Respondent)

Unit: "all employees of The Redwood Shelter in the Regional Municipality of Toronto, save and except Program Coordinator and Executive Director" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	12

3135-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Centre psycho-social pour enfants et familles (Ottawa-Carleton) (Respondent)

Unit: "all employees of the Centre Psycho-Social Pour Enfants et Familles (Ottawa-Carleton) in the Regional Municipality of Ottawa-Carleton, save and except Business Manager, Chief of Mental Health Services, Chief of Day Care Services and those above such ranks, and Administrative Secretary, Administrative Assistant, Chief of Day Care Services Secretary, Chief of Mental Health Services Secretary, and Caretaker" (68 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	68
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	34
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	5

3136-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Rose City Ford Sales Limited (Respondent)

Unit: "all employees of Rose City Ford Sales Limited in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff" (72 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	72
Number of persons who cast ballots	68
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	68

Number of ballots marked in favour of applicant	48
Number of ballots marked against applicant	20

3159-97-R: Ontario Nurses' Association (Applicant) v. Extendicare (Canada) Inc., Kirkland Lake (Respondent) v. Service Employees Union, Local 478 (Intervener)

Unit: "all registered and graduate nurses employed in a nursing capacity by Extendicare (Canada) Inc. in Kirkland Lake, save and except the Director of Care, persons above the rank of Director of Care and persons in bargaining units for which any trade union held bargaining rights as of November 24, 1997" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	5

3160-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Lambton County Board of Education (Respondent)

Unit: "all Temporary Educational Assistants employed by the Lambton Board of Education" (60 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	60
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

3166-97-R: Office & Professional Employees International Union (Applicant) v. North of Superior District Roman Catholic Separate School Board (Respondent)

Unit: "all employees of the North of Superior District Roman Catholic Separate School Board employed in the Territorial District of Thunder Bay, save and except Superintendents, persons above the rank of Superintendents, Teachers, as defined in the School Boards and Teachers Collective Negotiations Act, Occasional Teachers, Executive Secretary to the Director of Education, Business Manager, Payroll, Personnel Clerk, Accountant/Manager of Finance, Special Education Coordinator, Northern Lights Project Leader, and employees in bargaining units for which any trade union held bargaining rights as of November 25, 1997" (43 employees in unit)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	1

3200-97-R: The Canadian Union of Operating Engineers and General Workers (Applicant) v. Lyons Fire Protection Services Inc. (Respondent)

Unit: "all employees of Lyons Fire Protection Services Inc. employed in fire protection services in and out of the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	8
Number of ballots segregated and not counted	2

3216-97-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Dresden (Respondent)

Unit: "all employees of the Corporation of the Town of Dresden, save and except Clerk/Treasurer and Public Works Superintendent, persons above the rank of Clerk/Treasurer and Public Works Superintendent, and employees in bargaining units for which any trade union held bargaining rights as of November 28, 1997" (8 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	8

3221-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. 1249762 Ontario Inc. o/a Mega City Tiling (Respondent)

Unit: "all marble, tile and terrazzo, cement masons and their respective helpers, apprentices and improvers employed by the responding party in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) *(Having regard to the agreement of the parties)*

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

3223-97-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Produits Alumina Inc. (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of Produits Alumina Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of Produits Alumina Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of persons who cast ballots	2
Number of ballots marked in favour of applicant	2

3242-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Cine-Sieges Demeule (1989); Quinette Gallay (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Cine-Sieges Demeule (1989); Quinette Gallay in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Cine-Sieges Demeule (1989); Quinette Gallay in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2

3257-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Perth County Board of Education (Respondent)

Unit: "all Educational Assistants employed by the Perth County Board of Education, in the County of Perth" (80 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	80
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	50
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	3

3285-97-R: Peterborough Typographical Union Local 248 (Applicant) v. Sterling Newspapers Company, c.o.b. as The Lindsay Daily Post (Respondent)

Unit: "all employees of Sterling Newspapers Company, c.o.b. as The Lindsay Daily Post in the Town of Lindsay, in the mail room department who regularly work less than 24 hours per week, save and except supervisors and persons above the rank of supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	13

3314-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. Burnac Corporation (Respondent)

Unit: "all employees of Burnac Corporation engaged in cleaning and maintenance at the Cambrian Mall, 44 Great Northern Road, Sault Ste. Marie, Ontario, save and except foremen, persons above the rank of foreman, supervisors, persons above the rank of supervisor, office and clerical staff, sales representatives and students" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	8

3315-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. Municipal Corporation of the Township of Denbigh, Abinger and Ashby (Respondent)

Unit: "all employees of the Municipal Corporation of the Township of Denbigh, Abinger and Ashby in the Township of Denbigh, Abinger and Ashby, save and except Clerk Treasurer, persons above the rank of Clerk

Treasurer, office and clerical staff and part-time employees” (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	5
Number of ballots marked in favour of applicant	5

3356-97-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Chapleau Board of Education (Respondent)

Unit: “all employees engaged in custodial and maintenance services employed by the Chapleau Board of Education” (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	5
Number of ballots marked in favour of applicant	5

3414-97-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Beardmore, Geraldton, Longlac and Area Board of Education (Respondent)

Unit: “all maintenance and custodial employees of the Beardmore, Geraldton, Longlac and Area Board of Education employed in the Territorial District of Thunder Bay, save and except foreman and persons above the rank of foreman” (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	17
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	12
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	2

Applications for Certification Dismissed Subsequent to Vote

1975-97-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. William Day Construction Limited (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of William Day Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters’ apprentices in the employ of Will Day Construction Limited in all other sectors of the construction industry within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit)

Number of names of persons on revised voters’ list	17
Number of persons who cast ballots	17
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	6

2623-97-R: Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newspaper Guild (Applicant) v. Sterling Newspapers Company, c.o.b. as The Enterprise-Bulletin (Respondent)

Unit: “all employees of Sterling Newspapers Company c.o.b. as The Enterprise-Bulletin in the Town of Collingwood, save and except managers and persons above the rank of manager and persons employed in the mail room

constitute a unit of employees of the responding party appropriate for collective bargaining” (32 employees in unit)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	16
Number of names of persons on revised voters' list	20
Number of persons who cast ballots	20
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	1

2695-97-R: International Brotherhood of Electrical Workers' Local Union 1739 (Applicant) v. Nu-Tek Electric Incorporated (Respondent)

Unit: “all electricians and electricians' apprentices in the employ of Nu-Tek Electric Incorporated in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of Nu-Tek Electric Incorporated in all other sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	2

2740-97-R: United Food and Commercial Workers Union, Local 1977 (Applicant) v. White Rose Crafts and Nursery Sales Limited (Respondent)

Unit: “all employees of White Rose Crafts and Nursery Sales Limited at its Distribution Centre at 271 Caldari Road and 2841 Langstaff Road in the City of Vaughan, save and except assistant managers and those above the rank of assistant manager” (71 employees in unit)

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	69
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	16

2999-97-R: Service Employees Union, Local 183 (Applicant) v. The Bridge Street Retirement Residence (Respondent)

Unit: “all employees of The Bridge Street Retirement Residence in the City of Belleville, Ontario, save and except supervisors and persons above the rank of supervisor.” (22 employees in unit)

Number of names of persons on revised voters' list	22
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21

Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	11

3102-97-R: Christian Labour Association of Canada (Applicant) v. Idomo Furniture Warehouse (Respondent)

Unit: "all employees of Idomo Furniture Warehouse in the Municipality of Metropolitan Toronto and in the City of Mississauga, save and except commissioned sales staff, supervisors and persons above the rank of supervisor" (42 employees in unit)

Number of names of persons on revised voters' list	42
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	17

3144-97-R: Teamsters Local Union 938 (Applicant) v. Mainville Lumber Company Ltd. (Respondent)

Unit: "all employees of Mainville Lumber Company Ltd. in the Town of Rayside - Balfour, save and except foremen, persons above the rank of foreman, sales and office staff" (24 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	13

3158-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. Bombardier Inc. (Respondent) v. The Amalgamated Transit Union, local 1587 (Intervener)

Unit: "all employees of Bombardier Inc., engaged in the service, repair and maintenance of GO Trains at the GO Willowbrook Facility, 1215 Judson Street, Toronto, Ontario, save and except office and sales staff" (119 employees in unit)

Number of names of persons on revised voters' list	119
Number of persons who cast ballots	105
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	102
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	46
Number of ballots marked against applicant	56
Number of ballots segregated and not counted	3

3161-97-R: International Alliance of Theatrical Stage Employees Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada (Applicant) v. Deluxe Toronto Limited (Respondent) v. Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Intervener)

Unit: "all employees of Deluxe Toronto a.k.a. Colour by Deluxe in the City of Toronto in the Municipality of Metropolitan Toronto, save and except head operators, persons above the rank of head operator and office staff" (172 employees in unit)

Number of names of persons on revised voters' list	172
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Number of persons who cast ballots	166
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	165
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	58
Number of ballots marked against applicant	106
Number of ballots segregated and not counted	1

3193-97-R: United Steelworkers of America (Applicant) v. Ideal Metals & Alloys of Canada Inc. (Respondent)

Unit: "all employees of Ideal Metals & Alloys of Canada Inc. in the City of Brampton, save and except Co-ordinators and persons above the rank of Co-ordinator and office, clerical and sales staff" (47 employees in unit)

Number of names of persons on revised voters' list	47
Number of persons who cast ballots	50
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	47
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	33

3258-97-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Technique Contracting Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of Technique Contracting Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Technique Contracting Inc. in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

3273-97-R: International Union of Bricklayers and Allied Craftsmen, Local 4 (Applicant) v. Classic Tile Contractors Limited (Respondent)

Unit: "all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers in the employ of Classic Tile Contractors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers in the employ of Classic Tile Contractors Limited in all other sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	2

3295-97-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses (Brant-Norfolk-Haldimand) (Respondent)

Unit: "all registered and graduate practical nurses employed by Victorian Order of Nurses at Brant-Norfolk-Haldimand Branch" (43 employees in unit)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	9

Applications for Certification Withdrawn

3209-97-R: United Brotherhood of Carpenters and Joiners of America, Local 494 (Applicant) v. Marcel's Drywall Ltd. (Respondent) (*Terminated*)

3230-97-R: Centrale des syndicats francophones de l'Ontario (Applicant) v. Le conseil des écoles séparées catholiques du district de Sudbury (Respondent)

3310-97-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Chimo Hotel (Respondent)

3385-97-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Sterling Tile and Carpet Co. Ltd. c.o.b. as Sterling Tile and Carpet (Respondent)

APPLICATIONS UNDER SECTION 6 OF BILL 7

3879-95-R: Marriott Corporation of Canada Ltd. (at Queen's University) (Applicant) v. Canadian Union of Public Employees and its Local 229 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1953-96-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. All Ports Insulations and Asbestos Service Ltd. and Superior Insulation Services Inc. (Respondents) (*Withdrawn*)

3697-96-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Earl Carr Electric Ltd., Earl Carr, Power-Tek Electrical Services Inc., D.K.L. Electric Enterprises Ltd., David Lindsay and S.K.J.K. Electrical Services Ltd. (Respondents) (*Endorsed Settlement*)

4238-96-R: Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Applicant) v. Les Construction H.G.B. Inc. and Silentec Ltd. (Respondents) (*Dismissed*)

0004-97-R: Labourers' International Union of North America, Local 597 (Applicant) v. T & F Construction Ltd., and Rockton Contractors Inc. (Respondents) (*Withdrawn*)

0964-97-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. T & S Electrical Limited and 1169005 Ontario Limited (c.o.b. as Rama Installations) (Respondents) (*Endorsed Settlement*)

1150-97-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. #1004058 Ontario Ltd. (formerly known as Skarlan Waterproofing Inc.), 1041367 Ontario Ltd. (Respondents) (*Endorsed Settlement*)

1278-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. Blackbird Holdings Ltd., Sutherland-Schultz Inc. (Respondents) (*Withdrawn*)

1453-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 615079 Ontario Limited c.o.b. as Harris Electric, Mapleton Electric Limited, Rama Electric Ltd., DMZ Electric Ltd. and Maza Electric Ltd. (Respondents) (*Granted*)

2013-97-R: Labourers' International Union of North America, Local 837 (Applicant) v. T & F Construction Limited, 1218310 Ontario Limited, c.o.b. as Fallsview Contracting (Respondents) (*Withdrawn*)

3014-97-R: International Brotherhood of Painters & Allied Trades, Local Union 1891 (Applicant) v. Lopes Drywall & Acoustics Inc. and Lopes Drywall & Acoustics Corp. (Respondents) (*Granted*)

SALE OF A BUSINESS

1953-96-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. All Ports Insulations and Asbestos Service Ltd. and Superior Insulation Services Inc. (Respondents) (*Withdrawn*)

3697-96-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Earl Carr Electric Ltd., Earl Carr, Power-Tek Electrical Services Inc., D.K.L. Electric Enterprises Ltd., David Lindsay and S.K.J.K. Electrical Services Ltd. (Respondents) (*Endorsed Settlement*)

0004-97-R: Labourers' International Union of North America, Local 597 (Applicant) v. T & F Construction Ltd., and Rockton Contractors Inc. (Respondents) (*Withdrawn*)

0717-97-R: Pembroke Civic Hospital (Applicant) v. Pembroke General Hospital, The United Steelworkers of America, The Practical Nurses Federation of Ontario, The Association of Allied Health Professionals: Ontario, The Ontario Nurses Association, and The Canadian Union of Public Employees and its Local 1502 (Respondents) (*Granted*)

0964-97-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. T & S Electrical Limited and 1169005 Ontario Limited (c.o.b. as Rama Installations) (Respondents) (*Endorsed Settlement*)

1150-97-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. #1004058 Ontario Ltd. (formerly known as Skarlan Waterproofing Inc.), 1041367 Ontario Ltd. (Respondents) (*Endorsed Settlement*)

1278-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. Blackbird Holdings Ltd., Sutherland-Schultz Inc. (Respondents) (*Withdrawn*)

1453-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 615079 Ontario Limited c.o.b. as Harris Electric, Mapleton Electric Limited, Rama Electric Ltd., DMZ Electric Ltd. and Maza Electric Ltd. (Respondents) (*Granted*)

2013-97-R: Labourers' International Union of North America, Local 837 (Applicant) v. T & F Construction Limited, 1218310 Ontario Limited, c.o.b. as Fallview Contracting (Respondents) (*Withdrawn*)

2082-97-R: Community Care Access Centre of Wellington-Dufferin (Applicant) v. Ontario Nurses' Association (Respondent) (*Endorsed Settlement*)

3014-97-R: International Brotherhood of Painters & Allied Trades, Local Union 1891 (Applicant) v. Lopes Drywall & Acoustics Inc. and Lopes Drywall & Acoustics Corp. (Respondents) (*Granted*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

0756-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Meadowbrook Homes Inc. and Pineroock Homes Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0872-97-R: The Employees of Ideal Parking Represented by Paul Houngue & Raymond Vardon (Applicant) v. Hospitality & Service Trades Union Local 261 (Respondent) v. Ideal Parking Inc. (Intervener)

Unit: "all employees of Ideal Parking Inc. in the city of Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (29 employees in unit) (*Granted*)

2964-97-R: Peter Galeota, Robert Valere, Donald Pallas, Frank Leonardo, Peter Dunbar, George Ellery, Clayton Yeo (Applicant) v. Teamsters' Local Union 938 (Respondent) v. Orion Bus Industries Ltd. (Intervener)

Unit: "all employees of the company employed in the City of Mississauga, save and except foremen, persons above the rank of foreman, sales, office, clerical and technical staff, security guards, students employed in a cooperative education program, and students employed during the school vacation period" (227 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	380
Number of persons who cast ballots	354
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	353
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	5
Number of ballots marked in favour of respondent	165
Number of ballots marked against respondent	184

3013-97-R: Employees of St. Augustine Seminary and members of the Canadian Union of Operating Engineers and General Workers (Applicant) v. Canadian Union of Operating Engineers and General Workers (Respondent) v. St. Augustine's Seminary (Intervener)

Unit: "all employees of St. Augustine's Seminary of Toronto employed in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, teaching staff, kitchen staff, housekeeping staff, office and clerical staff and employees regularly employed for not more than 24 hours per week" (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2

3050-97-R: Group of Employees of Polymer Technologies Inc. (Applicant) v. Glass, Molders, Pottery, Plastics and Allied Workers International Union, Local 392 (Respondent) v. Polymer Technologies Inc. (Intervener)

Unit: "all plant employees of Polymer Technologies Inc. in Cambridge, Ontario, save and except foremen, persons above the rank of foremen, skilled trades, office, clerical and sales staff" (120 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	119
Number of persons who cast ballots	109
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	109
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	47
Number of ballots marked against respondent	61

3053-97-R: Martin Solyom (Applicant) v. IWA - Canada (Respondent) v. Pinchurst Woodworking Co. Inc. (Intervener)

Unit: "all employees of Pinchurst Woodworking Co. Inc., in the City of Brampton, and the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office and sales staff, installers, persons employed for not more than 24 hours per week and students employed during the school vacation period" (112 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	113
Number of persons who cast ballots	102
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	100

Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of respondent	76
Number of ballots marked against respondent	24
Number of ballots segregated and not counted	2
Number of names of persons on revised voters' list	113
Number of persons who cast ballots	102
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	100
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of respondent	76
Number of ballots marked against respondent	24
Number of ballots segregated and not counted	2

3112-97-R: Scott Sauder (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173 (Respondent) v. Niagara Falls Theatre Venture (Intervener)

Unit: "all projectionists employed by Niagara Falls Theatre Venture in the City of Niagara Falls, save and except persons at or above the rank of Projection Manager" (4 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	3

3121-97-R: Joe Machado (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Sisters of St. Joseph for the Diocese of Toronto in Upper Canada (Intervener)

Unit: "all lay employees of the Sisters of St. Joseph for the Diocese of Toronto in Upper Canada at Morrow Park in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, office and clerical staff, Registered and Graduate Nurses, Physiotherapists and employees in bargaining units for which any trade union held bargaining rights as of August 18, 1995" (82 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	85
Number of persons who cast ballots	70
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	70
Number of spoiled ballots	2
Number of ballots marked in favour of respondent	35
Number of ballots marked against respondent	33

3125-97-R: Marchelino Employee Movenpick (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Respondent) v. Richtree Markets Inc. (Intervener)

Unit: "all employees of Marchelino Restaurants Ltd. c.o.b. as Marchelino Restaurants in the City of Ottawa, save and except District Manager, Store Manager, Assistant Manager, Floor Manager, Bar Manager and persons above the rank of District Manager, Store Manager, Assistant Manager, Floor Manager, Bar Manager and office and clerical staff." (62 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	27

3248-97-R: Marek Kusnierz (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers Local 95 (Respondent) v. Inseal Contracting Inc. (Intervener)

Unit: “all sprayers and trimmers in the employ of Inseal Contractors Inc. in the Regional Municipality of Durham (except the towns of Ajax and Pickering); the Geographic Township of Cavan in the County of Peterborough and the Geographic Township of Manvers in the County of Victoria, and in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked against respondent	8

3431-97-R: Garth Everitt, Wendy Adams, Derek Deacon & , Connie Sterling (Applicants) v. International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America (UAW Local 251) (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2103-96-U: Ed Mirvish Enterprises Limited operating the Princess of Wales Theatre and the Royal Alexandra Theatre (Applicant) v. The International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 58, Toronto (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2041-95-U: Gerald MacKay (Applicant) v. The Board of Education for the City of York and Ontario Public School Teachers Federation, Provincial Office (Respondents) (*Dismissed*)

0570-96-U: Les employé(e)s clericaux de l'Hopital Montfort (Applicant) v. Union internationale des mécaniciens de machines fixes, section locale 796 (I.U.O.E.) (Respondent) (*Withdrawn*)

2481-96-U: McKay-Cocker Construction Limited (Applicant) v. William Suppa (Respondent) (*Withdrawn*)

2488-96-U: Viora Campbell (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) v. The Municipality of Metropolitan Toronto (Intervener) (*Dismissed*)

2866-96-U: Shillinder Bains, Brenda Crowley, Mary Ellen Ferguson, Carolyn Pollard, Mike Smit, Dave Zadrow (Applicant) v. The University of Guelph Staff Association (Respondent) v. University Of Guelph (Intervener) (*Withdrawn*)

3312-96-U: David D. Stanley (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Seneca College Of Applied Arts And Technology (Intervener) (*Dismissed*)

3623-96-U: International Brotherhood of Electrical Workers Local Union 1788 (Applicant) v. International Brotherhood of Electrical Workers and Ken Woods (Respondent) (*Dismissed*)

3950-96-U: United Brotherhood of Carpenters and Joiners of America, Local 1072 and Joe Almeida (Applicant) v. United Brotherhood of Carpenters and Joiners of America (Respondent) (*Terminated*)

4162-96-U: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Skarlan Waterproofing Ltd. (Respondent) (*Withdrawn*)

0154-97-U: United Food and Commercial Workers International Union, Local 175 & 163 (Applicant) v. Caressant Care Retirement Home (Fergus) (Respondent) (*Withdrawn*)

0288-97-U: Scott Wilson (Applicant) v. C.A.W. Local 222 (Respondent) v. Mackie Automotive Systems (Whitby) Inc. (Intervener) (*Terminated*)

0568-97-U: Timothy J. Bobinski (Applicant) v. The Amalgamated Transit Union Local 1633 & International Vice President (Respondent) v. The Corporation of the City of Welland (Intervener) (*Dismissed*)

0627-97-U: Bill Hannon, Don Flynn, Ross Nafziger, Gary Collins, Nick Altmayor, Ron Williams, Blair Nowe, Betty Nowe, Blayne Nowe, Ken Drummond, Sandy Sim, Ron Moreau, Nancy Steen and other members of the Schneider Employees' Association (Applicants) v. Schneider Employees' Association (Respondent) v. J.M. Schneider Inc. (Intervener) (*Withdrawn*)

0698-97-U: Barbara Ifill (Applicant) v. CUPE Local 1156 and Queen Elizabeth Hospital, Toronto (Respondents) (*Dismissed*)

0831-97-U: Ronald Taillon (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1072 (Respondent) v. Ontario Store Fixtures Inc. (Intervener) (*Withdrawn*)

0837-97-U: Ivan Poklar, Ilia Zlopasa, Jan Gilian (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Respondent) (*Dismissed*)

0954-97-U: Canadian Union of Public Employees and its Local 2862 (Applicant) v. Ottawa Valley Autistic Homes (Respondent) (*Withdrawn*)

1085-97-U: David Donnelly (Applicant) v. Don Park Inc. c.o.b. as Don Park Fire Protection Systems ("Don Park") and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 853 (Respondents) (*Withdrawn*)

1251-97-U; 2715-97-U: Hospitality & Services Trades Union, Local 261 (Applicant) v. Ideal Parking Inc. (Ottawa) (Respondent); Hospitality & Service Trades Union, Local 261 (Applicant) v. Ideal Parking Inc. (Respondent) (*Withdrawn*)

1277-97-U: International Union of Operating Engineers, Local 793 (Applicant) v. Blackbird Holdings Ltd., Sutherland-Schultz Inc. (Respondents) (*Withdrawn*)

1367-97-U: Lise Trudel (Applicant) v. Le Collège Algonquin (Respondent) (*Withdrawn*)

1740-97-U: International Union of Operating Engineers, Local 793 (Applicant) v. Bombardier Inc. (Respondent) (*Withdrawn*)

1867-97-U: Ontario Public Service Employees Union (Local #436) (Applicant) v. Crown in Right of Ontario as represented by the Ministry of Community and Social Services (Rideau Regional Centre) (Respondent) (*Withdrawn*)

2096-97-U: Mr. Jeffrey Elton Hagar (Applicant) v. Communications, Energy and Paperworkers Union of Canada, Local 77 (Respondent) v. Domtar Inc., Domtar Speciality Fine Papers, St. Catharines Mill (Intervener) (*Withdrawn*)

2144-97-U: Trace J. Fice (Applicant) v. Larry Thomas (plant chairperson C.A.W. Local 1987) Rose Forestell (president C.A.W. Local 1987), Tomas Veitch (Union rep. C.A.W. Local 1987), Lorna Moses (C.A.W. National Rep.) (Respondents) v. NHB Industries Ltd. (Intervener) (*Withdrawn*)

2193-97-U: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Dave Good Plumbing & Heating, A Division of 524556 Ontario Inc. (Respondent) (*Withdrawn*)

2201-97-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Weston Fruitcake Company (Respondent) (*Withdrawn*)

2563-97-U: Communications, Energy and Paperworkers Local 102-0 (Applicant) v. DFR Printing, A Division of Runge Publishing (Respondent) (*Withdrawn*)

2628-97-U; 3072-97-U: Public Service Alliance of Canada (Applicant) v. Salvation Army Ottawa Booth Centre (Respondent); Public Service Alliance of Canada (Bargaining Agent) (Applicant) v. The Salvation Army Ottawa Booth Centre (Respondent) (*Withdrawn*)

2640-97-U: Metropolitan Toronto Sewer and Watermain Contractors Association (Applicant) v. Fourwinds Construction Inc., and A Council of Trade Unions acting as the representative and agent of Teamsters' Local Union 230, and Labourers' International Union of North America, Local 183, and International Union of Operating Engineers, Local 793 (Respondents) (*Granted*)

2658-97-U: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Betron Electric Ltd., Gary Ganim, Mark Beveredge (Respondents) (*Withdrawn*)

2719-97-U: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Belmont Drywall Concord Ltd. (Respondent) (*Withdrawn*)

2743-97-U: Glass, Molders, Pottery, Plastics and Allied Workers International Union (Applicant) v. Polymer Technologies Inc. and John Bell (Respondent) (*Withdrawn*)

2834-97-U: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-CANADA) (Applicant) v. Till-Fab Ltd. (Respondent) (*Granted*)

2931-97-U: Brian Gilchrist Purdie (Applicant) v. CUPE 1097 (Respondent) (*Withdrawn*)

2951-97-U: Bob Harris (Applicant) v. The United Steelworkers of America, Local 8773 (Respondent) (*Withdrawn*)

2988-97-U: Service Employees Union, Local 183 (Applicant) v. The Bridge Street Retirement Home (Respondent) (*Withdrawn*)

3046-97-U: Gail Savard (Applicant) v. Cupe Local 146 (Respondent) (*Withdrawn*)

3054-97-U: Martin Solyom, Dave Pandohie and Ken Sauve (Applicant) v. IWA - Canada (Respondent) (*Dismissed*)

3056-97-U: International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, Local 400 FWD (Applicant) v. La-Z-Boy Canada Limited (Respondent) (*Withdrawn*)

3060-97-U: Teamsters Local Union 938 (Applicant) v. Peter Galeota, Robert Valere, Donald Pallas, Frank Leonardo, Peter Dunbar, George Ellery and Clayton Yeo (Respondents) (*Withdrawn*)

3110-97-U: Rosalina S. Papa (Applicant) v. Noel Noble - Executive Chef Metropolitan Hotel Miguel Fuentes - Union Representative Local 75 Mary Sandella - Director Human Resources Metropolitan Hotel (Respondents) (*Dismissed*)

3155-97-U: Metropolitan Toronto Demolition Contractors Inc. (Applicant) v. The Dutchman, G. & N. Contracting, Brantem Excavating Inc. c/o Blue-Con Inc. (Respondents) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial Council (Interveners) (*Withdrawn*)

3156-97-U: Fernando Manuel Cravo (Applicant) v. Jofco Construction Inc. (Respondent) (*Dismissed*)

3192-97-U: Service Employees International Union Local 204 (Applicant) v. Sisters of St. Joseph (Respondent) (*Withdrawn*)

3227-97-U: Metropolitan Toronto Demolition Contractors Inc. (Applicant) v. R. MacNamara & Sons Services Ltd., Triple-M-Services and Consolidated Wrecking Co. Limited (Respondents) v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council (Intervenors) (*Withdrawn*)

3300-97-U: Christian Labour Association of Canada (CLAC) (Applicant) v. Canadian Waste Services Inc. (Respondent) (*Withdrawn*)

3335-97-U: Charles Formagin (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Respondent) (*Dismissed*)

3336-97-U: Serafino Maglieri (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) (*Dismissed*)

3400-97-U: Domenico Quistini (Applicant) v. Bakery Confectionery and Tobacco Workers International Union, AFL-CIO, CLC Local 264 (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

3376-97-M: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America and Local 1688, The Ontario Taxi Union (Applicant) v. Village Taxi Limited, Lawrence Park Taxi Limited, Henry Hoefmans, John Peterson, Piruz Hassanzadeh-Langrudi, Fardin Ayati Ghaffari (Respondents) v. Diamond Taxicab Association (Toronto) Limited and Diamond Taxicab Associates' Committee (Intervenors) (*Granted*)

APPLICATIONS FOR CONSENT TO PROSECUTE

2655-97-U: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Betron Electric Ltd., Gary Ganim, Mark Beveredge (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2548-97-M: The Textile Rental Institute of Ontario (Applicant) v. United Food and Commercial Workers, Local 351 (Respondent) v. James Miller (Objectors) (*Granted*)

3203-97-M: Gibson Cleaners (Applicant) v. United Food and Commercial Workers International Union, Local 351 (Respondent) (*Granted*)

TRUSTEESHIP

2500-96-T: Service Employees International Union (Applicant) v. London and District Service Workers' Union, Local 220 (Respondent) v. Group of Employees (Objectors) (*Granted*)

4305-96-T: International Brotherhood of Electrical Workers (Applicant) v. International Brotherhood of Electrical Workers, Local 1788 (Respondent) (*Dismissed*)

FINANCIAL STATEMENT

3840-96-M: Louis Martin (Applicant) v. International Union of Bricklayers and Allied Craftsmen, Local 5 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

0744-96-JD; 1323-96-JD: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Semple-Gooder Roofing Limited, Bothwell-Accurate Co. Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 785 (Respondents); Sheet Metal Workers' International Association, Local 562 (Applicant) v. Dean-Chandler Roofing Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 785 (Respondents) (*Granted*)

2816-96-JD: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Rili Construction Weston Ltd., Labourers' International Union of North America, Local 837 (Respondents) (*Dismissed*)

1981-97-JD: International Union of Operating Engineers, Local 793 (Applicant) v. Bennett & Wright Group and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508 (Respondents) (*Dismissed*)

2969-97-JD: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Steeplejack Services, a division of 353909 Ontario Ltd., Labourers' International Union of North America, Local 837 (Respondents) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1016-96-OH: Helen Lee (Applicant) v. Toronto Hydro (Respondent) (*Dismissed*)

0656-97-OH: Pat Duggan (Applicant) v. The Corporation of the City of Scarborough (Respondent) (*Dismissed*)

2569-97-OH: Laureano Diaz Garcia (Applicant) v. Vertisystem Inc. (Respondent) (*Dismissed*)

3097-97-OH: Sam Monaco (Applicant) v. Horizon Masonry (Respondent) (*Withdrawn*)

3101-97-OH: Fred Williams (Applicant) v. Shewfelt & Dezainde Construction Ltd. (Respondent) (*Withdrawn*)

3430-97-OH: Al Young (Applicant) v. Parchment Presentation (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

2817-95-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen Local 2, Ontario, and Marble Tile & Terrazzo Union, Local 31 (Applicants) v. Dineen Construction Limited, Mitchell Construction Limited, Buttcon Limited, M.A. Butt Construction Limited, M.A. Butt Construction (1983) Limited (Respondents) v. Terrazzo, Tile & Marble Guild of Ontario, Inc. (Intervener) (*Dismissed*)

1426-96-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Hancock Electric Inc. (Respondent) (*Withdrawn*)

1954-96-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. All Ports Insulations and Asbestos Service Ltd. and Superior Insulation Services Inc. (Respondents) (*Withdrawn*)

3188-96-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. The State Group Limited (Respondent) (*Withdrawn*)

3700-96-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Earl Carr Electric Ltd., Earl Carr, Power-Tek Electrical Services Inc., D.K.L. Electric Enterprises Ltd., David Lindsay (Respondents) (*Endorsed Settlement*)

4056-96-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Bondfield Construction Company (1983) Ltd. and 352021 Ontario Ltd. (Respondents) (*Withdrawn*)

0003-97-G: Labourers' International Union of North America, Local 597 (Applicant) v. T & F Construction Ltd., and Rockton Contractors Inc. (Respondents) (*Withdrawn*)

0219-97-G: International Brotherhood of Painters & Allied Trades, Local 1795 - Glaziers (Applicant) v. All Universal Glass & Aluminum, Universal Glass & Aluminum, All Universal Glass and All Right Glass Corp. (Respondents) (*Withdrawn*)

0963-97-G: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. T & S Electrical Limited and 1169005 Ontario Limited (c.o.b. as Rama Installations) (Respondents) (*Endorsed Settlement*)

1234-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Canadian Concrete Forming Limited (Respondent) (*Withdrawn*)

1259-97-G: Sheet Metal Workers' International Association, Local 30 - Production Workers (Applicant) v. Flexmaster Canada Ltd. (Respondent) (*Withdrawn*)

1629-97-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 765 (Applicant) v. The Electrical Power Systems Construction Association and Bradleigh Construction Limited (Respondents) (*Withdrawn*)

1957-97-G; 1959-97-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Municipality of Metropolitan Toronto (Respondent); International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Stacey Electric Company Limited (Respondent) (*Withdrawn*)

2014-97-G: Labourers' International Union of North America, Local 837 (Applicant) v. T & F Construction Limited, 1218310 Ontario Limited, c.o.b. as Fallview Contracting (Respondents) (*Withdrawn*)

2038-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Amico Contracting and Engineering Inc. (Respondent) (*Granted*)

2399-97-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Betron Electric Ltd. (Respondent) (*Withdrawn*)

2430-97-G: Labourers' International Union of North America, Local 837 (Applicant) v. Steeplejack Service A Division of 353909 Ontario Ltd. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 18 (Intervener) (*Withdrawn*)

2490-97-G: International Brotherhood of Painters and Allied Trades District Council 46 (Applicant) v. Glover & Associates Painting Ltd. c.o.b. Greenfield Painting Services (Respondent) (*Withdrawn*)

2618-97-G: The International Brotherhood of Painters and Allied Trades Local 1590 (Applicant) v. National Painting & Decorating Inc. (Respondent) (*Withdrawn*)

2708-97-G: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. The Corporation of the City of Etobicoke (Respondent) (*Withdrawn*)

2712-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Formcrete (1994) Ltd. (Respondent) (*Granted*)

2799-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Jack Bird Plumbing & Heating Ltd. (Respondent) (*Withdrawn*)

2852-97-G; 2853-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Comstock Canada Ltd. (Respondent) (*Withdrawn*)

2946-97-G: Sheet Metal Workers' International Association, Local 473 (Applicant) v. Commercial Sheet Metal Inc. (Respondent) (*Withdrawn*)

2997-97-G: International Union of Bricklayers and Allied Craftsmen, Local 6 (Applicant) v. The Board of Education for the City of Windsor (Respondent) (*Endorsed Settlement*)

3000-97-G: International Union of Bricklayers & Allied Craftworkers Local 23, Sarnia, Ontario (Applicant) v. D A Masonry Ltd. (Respondent) (*Granted*)

3044-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Black & McDonald Limited (Respondent) (*Terminated*)

3068-97-G: Labourers' International Union Of North America, Local 183 (Applicant) v. Brother's Curb & Sidewalk Construction Co. Ltd. (Rambo Construction) (Respondent) (*Granted*)

3070-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. A Structural Company Limited (Respondent) (*Granted*)

3073-97-G: International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. Galatia Construction (Respondent) (*Withdrawn*)

3076-97-G: International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Kub Glass & Mirror Installations (Respondent) (*Endorsed Settlement*)

3077-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mariofino Contracting Inc. (Respondent) (*Endorsed Settlement*)

3107-97-G: International Brotherhood of Painters and Allied Trades, Local Union 205 (Applicant) v. Star Painters & Decorators Incorporated (Respondent) (*Granted*)

3120-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. John Bianchi Grading Ltd. (Respondent) (*Withdrawn*)

3122-97-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Rosmar Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

3137-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Aquicon Construction Co. Ltd. (Respondent) (*Withdrawn*)

3153-97-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Standard Masonry (Respondent) (*Withdrawn*)

3165-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 786 (Applicant) v. Dominion Bridge-Ontario, A Unit of AMCA International Ltd. (Respondent) (*Withdrawn*)

3168-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 700 (Applicant) v. The On-Site Group Inc. (Respondent) (*Withdrawn*)

3175-97-G: International Union of Bricklayers and Allied Craftworkers, Local 7, Ottawa, Ontario (Applicant) v. Arban Terrazzo Tile and Marble Limited (Respondent) (*Endorsed Settlement*)

3176-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Q-Tech Limited 663925 Ontario Inc. (Respondent) (*Granted*)

3177-97-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. The State Group (Respondent) (*Withdrawn*)

3202-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Vout Welding and Fabricating Limited (Respondent) (*Granted*)

3261-97-G: International Union of Bricklayers and Allied Craftsmen, Local 6 (Applicant) v. London Caulking & Installations Limited (Respondent) (*Endorsed Settlement*)

3266-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Consoli Drywall and Ceiling Systems Ltd. (Respondent) (*Withdrawn*)

3311-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Oakdale Drywall and Acoustics (Respondent) (*Withdrawn*)

3313-97-G: Labourers' International Union of North America, Local 607 (Applicant) v. Amerigo Construction, a division of 428711 Ontario Limited (Respondent) (*Endorsed Settlement*)

3334-97-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Tetra Interior Construction Inc. (Respondent) (*Withdrawn*)

3351-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Everest Contracting & Engineering Inc. (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

4663-94-R: United Steelworkers of America (Applicant) v. Gourmet Baker Inc. (Respondent) (*Dismissed*)

4032-96-U: Alda May Campbell (Applicant) v. Service Employees International Union, Local 204 (Respondent) (*Dismissed*)

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1998

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Subsequent to Vote

2194-97-R: Sheet Metal Workers' International Association and the Ontario Sheet Metal Workers' Conference (Applicant) v. The Board of Education for the City of North York (Respondent)

Unit: "all journeymen and apprentice sheet metal workers in the employ of The Board of Education for the City of North York in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice sheet metal workers in the employ of The Board of Education for the City of North York in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	0

2195-97-R: Sheet Metal Workers' International Association and the Ontario Sheet Metal Workers' Conference (Applicant) v. The Board of Education for the City of North York (Respondent)

Unit: "all roofers in the employ of The Board of Education for the City of North York in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all roofers in the employ of The Board of Education for the City of North York in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1

2325-97-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Skuce Welding & Piping Ltd. (Respondent)

Unit: "all journeymen and apprentice plumbers and pipefitters in the employ of Skuce Welding & Piping Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice plumbers and pipefitters in the employ of Skuce Welding & Piping Ltd. in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

2443-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. 1180930 Ontario Inc. o/a Cormar (1996) Contracting (Respondent)

Unit: "all employees of 1180930 Ontario Inc. o/a Cormar (1996) Contracting engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of 1180930 Ontario Inc. o/a Cormar (1996) Contracting engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (30 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	2

2678-97-R: United Steelworkers of America (Applicant) v. Evans Investigation and Security Limited (Respondent) v. United Plant Guard Workers of America, Canadian Union of Professional Security Guards (Interveners)

Unit: "all security guards employed by Evans Investigation and Security Limited in the Province of Ontario, save and except guard supervisor, persons above the rank of supervisor, office, clerical and sales staff, students employed through cooperative programs, persons employed through Government incentive programs, and students employed during the school vacation period" (64 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	108
Number of persons who cast ballots	54
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	35
Number of ballots marked in favour of second intervener	0
Number of ballots segregated and not counted	5

2985-97-R: Canadian Union of Public Employees (Applicant) v. Haliburton County Home Support Services (Respondent)

Unit: "all employees of Haliburton County Home Support Services, save and except the Executive Director" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	3

3139-97-R: Centrale des syndicats francophones de l'Ontario (Applicant) v. Le Conseil des écoles séparées catholiques du district de Kirkland Lake-Timiskaming (Respondent)

Unit: "les aides-enseignantes et les aides-enseignants à l'emploi du Conseil des écoles séparées catholiques du district de Kirkland Lake-Timiskaming, dans ses écoles élémentaires et secondaires o le français est la langue d'enseignement en conformité avec la partie XII de la Loi sur l'éducation" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	10
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3141-97-R: Centrale des syndicats francophones de l'Ontario (Applicant) v. Le Conseil des écoles séparées catholiques du district de Kapuskasing (Respondent)

Unit: "les aides-enseignantes et les aides-enseignants à l'emploi du Conseil des écoles séparées catholiques du district de Kapuskasing, dans ses écoles élémentaires et secondaires o le français est la langue d'enseignement en conformité avec la partie XII de la Loi sur l'éducation" (13 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

3236-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Aramco Management Limited (Respondent) v. The United Food and Commercial Workers International Union (Intervener)

Unit: "all employees of Aramco Management Limited in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	63
Number of persons who cast ballots	63
Number of ballots marked in favour of applicant	51
Number of ballots marked against applicant	12

3250-97-R: Teamsters Local Union No. 419 (Applicant) v. Earle M. Jorgensen (Canada) Inc. (Respondent)

Unit: "all employees of Earle M. Jorgensen (Canada) Inc. in the City of Mississauga, save and except managers, persons above the rank of manager, office and sales staff" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	7

3271-97-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Malahide (Respondent)

Unit: "all employees of The Corporation of the Township of Malahide, save and except Roads Superintendent, persons above the rank of Roads Superintendent and office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	3

3284-97-R: Ontario Public Service Employees Union (Applicant) v. The Salvation Army Sunset Lodge Long Term Care Facility (Respondent)

Unit: "all employees of the Salvation Army Sunset Lodge Long Term Care Facility in the City of Orillia, save and except the Nurse Manager, supervisors and persons above the rank of supervisor" (35 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	0

3298-97-R: United Food and Commercial Workers International Union, AFL-CIO, CLC (Applicant) v. Canadian Blending & Processing Inc. (Respondent)

Unit: "all employees of the Canadian Blending & Processing Inc. in the City of Windsor, save and except Managers and persons above the rank of Manager and office staff" (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	5

3321-97-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Geraldton Emergency Services Inc. (Respondent)

Unit: "all employees of Geraldton Emergency Services Inc. in the Municipality of Greenstone, save and except the confidential secretary and the owner/operator" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6

Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0

3323-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Loeb Inc. (Respondent)

Unit: "all employees of Loeb Inc. (Cachet) in the Town of Markham, save and except department manager, persons above the rank of department manager, office employees, management trainees and inventory controller," (69 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

3326-97-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O., and C.L.C. (Applicant) v. Canadian Red Cross Society (Ontario Zone) (Respondent)

Unit: "all employees of the Canadian Red Cross Society (Ontario Zone) in the Towns of Geraldton, Nakina, Longlac, Jellicoe and Caramat, save and except supervisors and persons above the rank of supervisor" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	2

3342-97-R: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union AFL-CIO-CLC (Applicant) v. Temporary Industrial Personnel Specialists Inc. (Respondent)

Unit: "all full-time, part-time employees employed by Temporary Industrial Personnel Specialists Inc. as dispatchers, customer service, service co-ordinators, and sales persons in the Municipality of Etobicoke, save and except persons above the rank of supervisors" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	8

3343-97-R: Ontario Public Service Employees Union (Applicant) v. Revelations Group Home Inc. (Respondent)

Unit: "all employees of Revelations Group Homes Inc. in the City of Kingston, save and except Assistant Director and those persons above the rank of Assistant Director" (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	5

3344-97-R: Teamsters Local Union 91 (Applicant) v. RO-NA Warehouse (Respondent)

Unit: "all employees of RO-NA Warehouse in the City of Nepean, save and except supervisors and persons above the rank of supervisor, expert consultants, office and clerical staff, drivers and security guards" (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	8
Number of ballots segregated and not counted	3

3349-97-R: Canadian Union of Public Employees (Applicant) v. Township of Lancaster(Respondent)

Unit: "all employees of the Township of Lancaster in the County of Glengarry, save and except the Clerk-Treasurer and persons above the rank of Clerk-Treasurer" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	2

3355-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Maxi & Co. (Oakville) (Respondent)

Unit: "all employees of Maxi & Co. (Oakville) in the Town of Oakville, save and except Department Managers, persons above the rank of Department Manager, Office Employees, 2 Inventory Controllers and Management Trainees" (120 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	122
Number of persons who cast ballots	65
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	64
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant	21
Number of ballots segregated and not counted	1

3357-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Chapleau Board of Education (Respondent)

Unit: "all employees of the Chapleau Board of Education, save and except the Business Administrator, persons above the rank of Business Administrator, custodial maintenance employees and employees in bargaining units for which any trade union held bargaining rights as of December 5, 1997" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	6

3360-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Kirkland Lake Board of Education (Respondent)

Unit: "all regular full-time and part-time Educational Assistants employed by the Kirkland Lake Board of Education, save and except all Educational Assistants who are employed on a temporary or casual basis" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	0

3366-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Access Alliance Multicultural Community Health Centre (Respondent)

Unit: "all employees of Access Alliance Multicultural Community Health Centre in the Municipality of Metropolitan Toronto, save and except Program Co-ordinator/Administrative Co-ordinator, persons above the rank of Program Co-ordinator/ Administrative Co-ordinator, the Administrative Assistant, the Administrative Secretary, Physicians, Contract Staff and Locum Employees" (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0

3370-97-R: Teamsters Local Union No. 419 (Applicant) v. Russel Metals Inc. (Respondent)

Unit: "all employees of Russell Metals Inc. in the Town of Milton, save and except supervisors, persons above the rank of supervisor, team leaders, office, clerical and sales staff, and students employed during the school vacation period" (45 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	15
Number of ballots segregated and not counted	8

3371-97-R: Ontario District Council, Union of Needletrades, Industrial and Textile Employees (Applicant) v. Yorkbridge Packaging Inc. (Respondent)

Unit: "all employees of Yorkbridge Packaging Inc. in the City of Mississauga, save and except supervisors, persons above the rank of supervisors, office, clerical sales staff and employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (115 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	120
Number of persons who cast ballots	120
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	112
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

Number of spoiled ballots	1
Number of ballots marked in favour of applicant	64
Number of ballots marked against applicant	56
Number of ballots segregated and not counted	8

3377-97-R: Canadian Union of Public Employees (Applicant) v. Wingham & District Hospital (Respondent)

Unit: "all employees of the Wingham & District Hospital save and except: Supervisors, persons above the rank of Supervisor, Laboratory Technologist, Radiology Technologist, Physiotherapist, Occupational Therapist, Speech Language Pathologist, Kinesiologist, Social Worker, Secretary to Director of Rehabilitation Services, Secretary to Director of Finance and Services, Secretary to the Executive Director, Human Resources/Payroll Assistant and persons for whom any trade union held bargaining rights on the date of application" (97 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	88
Number of persons who cast ballots	67
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	7
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	21

3380-97-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Village of Frankford (Respondent)

Unit: "all employees of The Corporation of the Village of Frankford, save and except the Public Works Superintendent and Arena Manager, persons above the rank of Public Works Superintendent and Arena Manager, office and clerical staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

3381-97-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Township of Sidney (Respondent)

Unit: "all employees of The Corporation of the Township of Sidney, save and except managers, persons above the rank of manager, office and clerical staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	1

3387-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Lennox & Addington County Board of Education (Respondent)

Unit: "all Professional Student Services Personnel employed by the Lennox & Addington County Board of Education, save and except persons in other bargaining units for which a bargaining agent held bargaining rights as of December 11, 1997" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	6

3390-97-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Township of Mattice - Val Cote (Respondent)

Unit: "all employees of the Corporation of the Township of Mattice - Val Cote, save and except Treasurer and persons above the rank of Treasurer" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3394-97-R: United Food and Commercial Workers International Union, Local 1000A (Applicant) v. Banait Pharmacy Ltd. (c.o.b. as Shoppers Drug Mart) (Respondent)

Unit: "all employees of Banait Pharmacy Ltd. (c.o.b. as Shoppers Drug Mart) located at 7600 Weston Road, Woodbridge, Ontario, save and except Department Managers/Assistant Managers and persons above the rank of Department Managers/Assistant Managers and Pharmacists and Store Administrator" (46 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	47
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	25
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	6

3403-97-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Chronicle Journal, a division of Thomson Canada Limited (Respondent)

Unit: "all employees of the Chronicle Journal, a division of Thomson Canada Limited, in the City of Thunder Bay, the City of Dryden and the Town of Marathon, save and except the Publisher, Executive Assistant to the Publisher, Business Manager, Classified Supervisor, Advertising Director, Circulation Director, Distribution Manager, Managing Editor, Night Mail Room Supervisor, Day Mail Room Supervisor, Day Assignment Editor, Advertising Manager, Circulation Assistant Manager, Night News Editor, Sports Editor, Assistant Manager of Administration/Credit, students in a co-operative training program, employees in bargaining units for which any trade union held bargaining rights on December 12, 1997 and any other position in which a person exercises managerial or confidential functions within the meaning of the Ontario *Labour Relations Act, 1995*, section 1(3)(b)" (195 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	198
Number of persons who cast ballots	166
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	155
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	102
Number of ballots marked against applicant	53
Number of ballots segregated and not counted	11

3406-97-R: Christian Labour Association of Canada Construction Workers Local 52 (Applicant) v. Elta Gas Services Ltd. (Respondent)

Unit: "all labourers, operating engineers, gas fitters, gas fitters' apprentices, gas technicians and welders in the employ of Elta Gas Services Ltd. employed in the the Municipality of Metropolitan Toronto, now City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (53 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	43
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	43
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	11

3413-97-R: Teamsters Local Union No. 879 (Applicant) v. Newcap Inc. (Respondent)

Unit: "all employees of Newcap Inc. at its Clarke Transport Division, in the City of Kitchener, save and except supervisors, persons above the rank of supervisor, office and sales staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	1

3429-97-R: Local 636 of the International Brotherhood of Electrical Workers (Applicant) v. Dresden Utilities Commission (Respondent)

Unit: "all employees of Dresden Utilities Commission, save and except Manager/Secretary and Treasurer and persons above the rank of Manager/Secretary and Treasurer" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

3445-97-R: International Union of Operating Engineers Local 772 (Applicant) v. Versa Services Ltd. (Respondent)

Unit: "all employees of Versa Services Ltd. engaged in the cafeteria food service operations at 1200 Main Street, Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, the executive chef, office and clerical staff and students employed during the school vacation period," (28 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	8

3518-97-R: Canadian Union of Public Employees (Applicant) v. The Kent County Board of Education (Respondent)

Unit: "all occasional employees of The Kent County Board of Education employed as custodians, education assistants, or as clerical/office employees in the County of Kent, save and except supervisors, persons above the rank of supervisor, and persons for whom a trade union held bargaining rights on the date of application" (59 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	0

3546-97-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O., and C.L.C. (Applicant) v. Geraldton District Roman Catholic School Board (Respondent)

Unit: "all employees of the Geraldton District Roman Catholic School Board in the District of Thunder Bay, save and except supervisors, persons above the rank of supervisor, teachers and confidential secretary to the administrateur-financier et secrétaire-trésorier" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	9

3552-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. March Aluminum Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of March Aluminum Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial, and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	2

3568-97-R: United Steelworkers of America (Applicant) v. Guardian Protection Services Ltd. (Respondent)

Unit: "all employees of Guardian Protection Services Ltd. in the County of Frontenac, County of Lennox and Addington, City of Brockville, City of Belleville, Separated Town of Smith Falls, save and except patrol supervisor and area supervisor and persons above the rank of patrol supervisor and area supervisor, office, clerical and sales staff" (66 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	81
Number of persons who cast ballots	49
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	45
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	26

Number of ballots marked against applicant	21
Number of ballots segregated and not counted	2

3625-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in the building cleaning operations at 250 Front Street West, Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff and students employed during the school vacation period" (33 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	21
Number of ballots segregated and not counted	3

3629-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Loeb Ogilvie (Respondent)

Unit: "all employees of Loeb Ogilvie located at 1930 Montreal Road in the Region of Ottawa Carleton, save and except Department Managers, persons above the rank of Department Manager, Office Staff and Management Trainees" (75 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	79
Number of persons who cast ballots	48
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	45
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	3

3669-97-R: United Steelworkers of America (Applicant) v. York Condominium Corporation No. 42 (Respondent)

Unit: "all employees of York Condominium No. 42 in the City of Toronto, save and except Property Manager, and Security Manager and persons above the rank of Property Manager and Security Manager and Security Guards" (26 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

3624-97-R: United Steelworkers of America (Applicant) v. Wackenhut of Canada Limited (Respondent) v. United Food and Commercial Workers, Local 333 (Canadian Security Union) (Intervener)

Applications for Certification Dismissed Subsequent to Vote

2663-97-R: Canadian Union of Professional Security Guards (Applicant) v. Evans Investigation and Security Limited (Respondent) v. United Plant Guard Workers of America, United Steelworkers of America (Interveners)

Unit: “all security guards employed by Evans Investigation and Security Limited in the Province of Ontario, save and except guard supervisor, persons above the rank of supervisor, office, clerical and sales staff, students employed through cooperative programs, persons employed through Government incentive programs, and students employed during the school vacation period” (80 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	108
Number of persons who cast ballots	54
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked in favour of intervener	35
Number of ballots marked in favour of second intervener	0
Number of ballots segregated and not counted	5

2777-97-R: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Dominion Motors (Thunder Bay) Limited (Respondent)

Unit: “all employees employed as Service Writers, New and Used Car Salesmen and Service Salesmen at Dominion Motors (Thunder Bay) Limited in Thunder Bay, Ontario, to be added to the already existing bargaining unit” (3 employees in unit)

2780-97-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. RSG Mechanical Incorporated (1041779 Ontario Limited) (Respondent)

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of RSG Mechanical Incorporated (1041779 Ontario Limited) in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of RSG Mechanical Incorporated (1041779 Ontario Limited) in all other sectors of the construction industry in the County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

2804-97-R: Ontario Public Service Employees' Union (Applicant) v. Wabaseemoong Family Services Inc. (Respondent)

Unit: “all employees of Wabaseemoong Family Services Inc., save and except Human Resources Officer, Executive Director, Assistant to the Executive Director, supervisor and persons above the rank of supervisor regularly employed for more than 24 hours per week in the Municipalities of Kenora, Dryden, and Whitedog, Ontario” (36 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	15

3265-97-R: Amalgamated Transit Union Local 741 (Applicant) v. U-Need-A-Cab Limited (Respondent)

Unit: "all office employees of U-Need-A Cab Ltd., in the City of London, save and except persons above the rank of dispatcher" (0 employees in unit)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	27
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	18

3383-97-R: International Association of Machinists and Aerospace Workers (Applicant) v. Brita (Canada) Limited (Respondent)

Unit: "all employees of Brita Water Filter Systems at 102 Parkshore Drive, Brampton, Ontario L6T 5M1, save and except office personnel, sales personnel, persons above the rank of supervisor and temporary agency workers." (61 employees in unit)

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	63
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	56
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	36
Number of ballots segregated and not counted	7

3389-97-R: Canadian Union of Public Employees (Applicant) v. Group-Action Pour L'Enfant, la Famille et al Communauté de Prescott-Russell (Respondent)

Unit: "all employees of Groupe action pour l'enfant, la famille et la communauté de Prescott-Russell, save and except the Director" (11 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	14
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	7

3417-97-R: United Food and Commercial Workers International Union, Local 1000A (Applicant) v. Horizon Poultry, A Division of J.M. Schneider Inc. (Respondent) v. Schneider Employees' Association (Intervener)

Unit: "all employees of Horizon Poultry Products Inc. at Ayr, save and except foremen, persons above the rank of foreman, office staff (excluding office clerks) and sales staff" (128 employees in unit)

Number of names of persons on revised voters' list	135
Number of persons who cast ballots	113
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	111
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of intervener	100
Number of ballots segregated and not counted	2

3428-97-R: Local 636 of The International Brotherhood of Electrical Workers (Applicant) v. Blenheim Public Utilities Commission (Respondent)

Unit: "all employees of Blenheim Public Utilities Commission, save and except General Manager and those above the rank of General Manager" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	2

3565-97-R: United Steelworkers of America (Applicant) v. Guy-Tash Security Inc. (Respondent)

Unit: "all employees of Guy-Tash Security Inc. in the County of Frontenac, save and except patrol supervisors, coordinators and persons above the rank of patrol supervisor and coordinator, office, clerical and sales staff" (40 employees in unit)

Number of names of persons on revised voters' list	58
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	34
Number of ballots segregated and not counted	4

3597-97-R: The Employees' Association of Ottawa-Carleton (Applicant) v. Renfrew County Board of Education (Respondent) v. Ontario Secondary School Teachers' Federation (Intervener)

Unit: "all employees of The Renfrew County Board of Education employed as Secondary School Office Managers in Renfrew County, save and except temporary and casual Office Managers," (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	7

3657-97-R: Canadian Health Care Workers (C.H.C.W.) (Applicant) v. Barkingside Investments Ltd. operating as Lafontaine Terrace (Respondent) v. London & District Service Workers' Union, Local 220 (Intervener)

Unit: "all employees of Barkingside Investments Ltd. operating as Lafontaine Terrace in Kitchener, save and except supervisors, persons above the rank of supervisor, and office and clerical staff," (11 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	6

Applications for Certification Withdrawn

4365-96-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Nor Eng Construction and Engineering Inc. (Respondent) v. Labourers' International Union of North America, Local 493 (Intervener)

2089-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Best Western Highland Inn (Respondent)

3147-97-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Panproject Ltd. (Respondent)

3272-97-R: Canadian Union of Public Employees (Applicant) v. Hôpital Montfort (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

3374-97-R: Ontario Public Service Employees Union (Applicant) v. Marriott Corporation of Canada Limited (Respondent) v. Canadian Union of Public Employees, Hamilton Health Sciences Corporation, International Union of Operating Engineers Local 772 (Interveners)

3521-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Board to Board Construction Company (Respondent)

3844-97-R: Ontario Nurses' Association (Applicant) v. Community Care Access Centre of Peel (Respondent) v. Canadian Union of Public Employees (Intervener)

FIRST AGREEMENT - DIRECTION

3256-97-FC: The Salvation Army Ottawa Booth Centre (Applicant) v. Public Service Alliance of Canada (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2446-95-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. RLP Mechanical Ltd., RLP Machine & Steel Fabrication Inc. (Respondent) (*Granted*)

3072-96-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 114585 Canada Ltee. (carrying on business as Roch Cayer Ltd.) and 3247481 Canada Inc. (Respondents) (*Withdrawn*)

3078-96-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Thermotek Insulations Inc., and Fibron Insulations Inc. (Respondents) (*Withdrawn*)

0016-97-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Superior Insulation Services Inc., All Ports Insulations & Asbestos Service Ltd., Sentinel Systems Inc. and Sentinel Systems Inc., c.o.b. as Sentinel Insulation Systems (Respondents) (*Withdrawn*)

1798-97-R: Construction Workers Local 53, CLAC (Applicant) v. Gil and Sons Limited and or Canadian Fire Equipment and Systems Sales and Service (Respondents) (*Withdrawn*)

2148-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. D.F.N. Drywall and Acoustics Ltd. and SESCO Interiors Inc. (Respondents) (*Withdrawn*)

2160-97-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Charron Electric Ltd., 813842 Ontario Inc. (Respondents) (*Endorsed Settlement*)

2198-97-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. McKay-Cocker Construction Limited, Lafarge Canada Inc. (Respondents) (*Withdrawn*)

2784-97-R: I.B.E.W. Construction Council of Ontario, International Brotherhood of Electrical Workers, Local 105, International Brotherhood of Electrical Workers, Local 1739 (Applicants) v. Calorific Construction Limited, Bramkal Contractors Inc. (Respondents) (*Endorsed Settlement*)

3419-97-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and International Union of Bricklayers and Allied Craftsmen, Local 28 (Applicants) v. Cambrian Construction and Masonry Co., a division of 385310 Ontario Inc., and 510015 Ontario Inc. c.o.b. as Mela Investments (Respondents) (*Granted*)

3452-97-R: United Food and Commercial Workers Union, Local 175/633 (Applicant) v. 1185727 Ontario Inc. c.o.b. as Food Basics Store #990 and The Great Atlantic & Pacific Company of Canada, Limited on its own behalf and on behalf of its Subsidiaries, Associates, Affiliates and Divisions, including, among others, Miracle Food Mart of Canada (Respondents) (*Withdrawn*)

3589-97-R; 3593-97-R: Labourers' International Union of North America, Local 1059 (Applicant) v. The Board of Education for the City of London, Bondfield Construction Company (1983) Limited and 2820501 Canada Inc. c.o.b. as Belair Contracting (Respondents); Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicants) v. The Board of Education for the City of London, Bondfield Construction Company (1983) Limited and 2820501 Canada Inc., c.o.b. as Belair Contracting (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2446-95-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. RLP Mechanical Ltd., RLP Machine & Steel Fabrication Inc. (Respondent) (*Granted*)

3072-96-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 114585 Canada Ltee. (carrying on business as Roch Cayer Ltd.) and 3247481 Canada Inc. (Respondents) (*Withdrawn*)

3078-96-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Thermotek Insulations Inc., and Fibron Insulations Inc. (Respondents) (*Withdrawn*)

0016-97-R: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Superior Insulation Services Inc., All Ports Insulations & Asbestos Service Ltd., Sentinel Systems Inc. and Sentinel Systems Inc., c.o.b. as Sentinel Insulation Systems (Respondents) (*Withdrawn*)

1196-97-R: Labourers' International Union of North America, Ontario Provincial District Council and on behalf of its Affiliated Local Unions (Applicant) v. Kopic Wrecking Inc., and A & E Enterprises (Respondents) (*Withdrawn*)

2148-97-R: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. D.F.N. Drywall and Acoustics Ltd. and SESCO Interiors Inc. (Respondents) (*Withdrawn*)

2160-97-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Charron Electric Ltd., 813842 Ontario Inc. (Respondents) (*Endorsed Settlement*)

2198-97-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. McKay-Cocker Construction Limited, Lafarge Canada Inc. (Respondents) (*Withdrawn*)

2784-97-R: I.B.E.W. Construction Council of Ontario, International Brotherhood of Electrical Workers, Local 105, International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Calorific Construction Limited, Bramkal Contractors Inc. (Respondents) (*Endorsed Settlement*)

3419-97-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and International Union of Bricklayers and Allied Craftsmen, Local 28 (Applicants) v. Cambrian Construction and Masonry Co., a division of 385310 Ontario Inc., and 510015 Ontario Inc. c.o.b. as Mela Investments (Respondents) (*Granted*)

3452-97-R: United Food and Commercial Workers Union, Local 175/633 (Applicant) v. 1185727 Ontario Inc. c.o.b. as Food Basics Store # 990 and The Great Atlantic & Pacific Company of Canada, Limited on its own

behalf and on behalf of its Subsidiaries, Associates, Affiliates and Divisions, including, among others, Miracle Food Mart of Canada (Respondents) (*Withdrawn*)

3589-97-R; 3593-97-R: Labourers' International Union of North America, Local 1059 (Applicant) v. The Board of Education for the City of London, Bondfield Construction Company (1983) Limited and 2820501 Canada Inc. c.o.b. as Belair Contracting (Respondents); Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and , International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicants) v. The Board of Education for the City of London, Bondfield Construction Company (1983) Limited and 2820501 Canada Inc., c.o.b. as Belair Contracting (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2487-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Carleton Board of Education (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3895-95-R: Fort William Clinic (Applicant) v. Service Employees Union, Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Respondent) (*Withdrawn*)

2779-97-R: Can-Co Aluminum Inc. (Applicant) v. Carpenters and Allied Workers' Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) (*Dismissed*)

3270-97-R: David Mlikan (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 448 (Respondent) v. Newgen Restaurant Services Inc. c.o.b. as Tucker's Marketplace (Intervener)

Unit: "all employees of Newgen Restaurant Services Inc. c.o.b. as Tucker's Marketplace at 15 Carlson Court in the Municipality of Metropolitan Toronto, save and except Managers and persons above the rank of Manager" (76 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	25

3292-97-R: Robert Tolman (Applicant) v. International Brotherhood of Electrical Workers, Local 120 (Respondent) v. Edwards, A Unit of General Signal Limited (London Area Service Unit) (Intervener)

Unit: "Service Technicians employed by Edwards, A Unit of General Signal Limited (London Area Service Unit) in London, Ontario" (6 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	6

3352-97-R: Lyse Denis (Applicant) v. United Steelworkers of America (Respondent) v. Intelligarde International Inc. (Intervener)

Unit: "Intelligarde International Inc. ("the Employer") recognizes the United Steelworkers of America ("the Union") as the exclusive bargaining agent for all employees employed by the Employer in the Regional Municipality of Ottawa-Carleton, save and except persons covered by a collective agreement or by a current certificate issued by the Ontario Labour Relations Board prior to the date hereof, private investigators licensed under the Private Investigators and Security Officers Act, R.S.O. 1990, c. P.25 and employed as private investigators, Supervisors, persons who exercise managerial functions within the meaning of sec. 1(3) of the Ontario Labour Relations Act, persons above the rank of Supervisor" (12 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	9

3442-97-R: Serafino A. Gentili (Applicant) v. Office & Professional Employees International Union (Respondent) (*Dismissed*)

3524-97-R: Kristine Paul (Applicant) v. Office and Professional Employees International Union and its Local 343 (Respondent) v. Fasco Motors Limited (Intervener)

Unit: "all of the office, clerical and technical employees for Fasco Motors Limited in the City of Cambridge, Ontario, save and except supervisors and persons above the rank of supervisors as follows: President, Vice-Presidents (Directors), Managers, Human Resource Personnel, Secretary to the President, Secretary to the Vice-President (Director), persons who hold a confidential position and summer students." (18 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	14

3572-97-R: Angelika Vogler (Applicant) v. United Food & Commercial Workers, Local 206 (Respondent) v. Scott's Management Services Inc. (Intervener)

Unit: "all employees of Scott's Management Services Inc. employed at the Highway 401 Westbound and Highway 401 Eastbound restaurant/service centres in the Township of Tilbury East, save and except Assistant Managers, persons above the rank of Assistant Manager, clerical, and office staff" (95 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	96
Number of persons who cast ballots	64
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	62
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of respondent	23
Number of ballots marked against respondent	39

3621-97-R: Gregory Marshall (Applicant) v. International Brotherhood of Electrical Workers Local Union 353 (Respondent) v. Edwards, A Unit of General Signal Limited (Intervener)

Unit: "all employees of Edwards of Canada at or out of Barrie, save and except supervisors, persons above the rank of supervisor and office and sales staff" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5

3718-97-R: Paul Tester (Applicant) v. United Food and Commercial Workers International Union Local 175 (Respondent) v. MSAS Cargo International (Canada) Inc. (Intervener)

Unit: "all employees of MSAS Cargo International (Canada) Inc. at 3250 Caravelle Drive, Mississauga (now moved to 1825 Alstep Drive), save and except Assistant Supervisors and those above the rank of Assistant Supervisor, Office and Clerical and Sales Staff" (14 employees in unit) (*Granted*)

3807-97-R: A.H. Tallman Bronze Employees (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 504 (Respondent) v. A.H. Tallman Bronze Co. Ltd. (Intervener) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3592-97-U: Hendrickson Canada Ltd. (Applicant) v. United Steel Workers of America, Local 8773, Stephen Banks, David Harvey, Doug Pelton, Dennis Gatschene, Doug Forbes, Brian Elgie, Kerry Runciman, Doug Pestell and Mike Buhlman (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3690-97-U: Viewmark Homes Ltd. (Applicant) v. Carpenters D.C. of Toronto & Vicinity, Local 27, Carpenters, Local 675, Steven Wolfreys, Cesar Rodrigues, Gord Webster, Jerry Oxford and Valado Vujevic (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0540-95-U: International Brotherhood of Electrical Workers (Applicant) v. William Gilroy, John Sprackett, Joseph Mulhall, Thomas MacLean, Judy Mitchell, Ashton Tuck, Fraser Strong, John Wabb (Respondents) (*Terminated*)

4022-95-U: Graphic Communications International Union, Local 588 (Applicant) v. Northbond Graphics Inc. (Respondent) (*Withdrawn*)

4168-95-U; 1788-96-U: Giancarlo Cesaroni (Applicant) v. Local Union 46 (Respondent); John Cesaroni (Applicant) v. Local Union 46 of the United Association of Plumbers and Steamfitters of the United States and Canada (Respondent) (*Withdrawn*)

2969-96-U: Dorothy Nivens, Michel Quirion, Michael Owen (Applicant) v. The Independent Canadian Transit Union, Local 9 and Centre de Sante' Elisabeth Bruyere Health Centre (Respondents) (*Terminated*)

3040-96-U: Canadian Union of Public Employees and its Local 2424 (Applicant) v. Carleton University (Respondent) (*Granted*)

0014-97-U: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Nor Eng Construction and Engineering Inc. (Respondent) (*Withdrawn*)

0187-97-U: The Communications, Energy and Paperworkers Union of Canada (Applicant) v. Paperboard Industries Corporation (Respondent) (*Withdrawn*)

0207-97-U: Service Employees International Union, Local 204 (Applicant) v. The Group Home for the Deaf/Blind Persons [Brantford] Inc. (Respondent) (*Withdrawn*)

0270-97-U: Hogarth-Westmount Hospital Part-Time Employees (Applicant) v. Service Employees Union Local 268 (Respondent) (*Dismissed*)

0274-97-U: Canadian Union of Public Employees and its Local 3826 (Applicant) v. Ottawa-Carleton Lifeskills Inc. (Respondent) (*Withdrawn*)

0302-97-U; 0334-97-U: Soft Drink Workers Joint Local Executive Council (Applicant) v. Coca-Cola Bottling Ltd. (Respondent) (*Withdrawn*)

0736-97-U: International Brotherhood of Painters and Allied Trades, Local Union 1819 (Glaziers) (Applicant) v. 489584 Ontario Limited c.o.b. as F.G. Aluminum & Glass (Respondent) (*Withdrawn*)

0895-97-U: Theresa A. Livingston (Applicant) v. Double D. Catering & Vending Division of Double D. Distributors Ltd. (Respondent) v. United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 251 (Intervener) (*Withdrawn*)

1230-97-U: International Brotherhood of Electrical Workers, Construction Council of Ontario and Bruce Tessier (Applicants) v. Tri-Bec Inc. (Respondent) (*Withdrawn*)

1239-97-U: Simon Burstein (Applicant) v. Bakery, Confectionery & Tobacco Workers International Union, Local 181 (Respondent) v. Open Window Bakery Limited (Intervener) (*Dismissed*)

1428-97-U: Lori Lamers (Applicant) v. United Steel Workers of America Local 4657, Polytech Netting Industries a Division of Tecsyn Canada (Respondents) v. Brenda Westington (Intervener) (*Withdrawn*)

1439-97-U; 1440-97-U: Wayne Dewitt (Applicant) v. Burns International Security Services Limited (Respondent) v. United Steelworkers of America (Intervener); Wayne Dewitt (Applicant) v. United Steelworkers of America (Respondent) v. Burns International Security Services Limited (Intervener) (*Withdrawn*)

1441-97-U; 1442-97-U: Lisa Smith (Applicant) v. United Steelworkers of America (Respondent) v. Burns International Security Services Limited (Intervener); Lisa Smith (Applicant) v. Burns International Security Services Limited (Respondent) v. United Steelworkers of America (Intervener) (*Withdrawn*)

1443-97-U: Larry Stempein (Applicant) v. The Ontario Public Service Employees Union (Respondent) v. The Crown in Right of Ontario as represented by The Ministry of Consumer and Commercial Relations (MCCR) (Intervener) (*Dismissed*)

1871-97-U: Service Employees' Union, Local 210 (Applicant) v. Leamington United Mennonite Home and Apartments (Respondent) (*Withdrawn*)

1876-97-U: Salvatore Ingraldi (Applicant) v. Amalgamated Transit Union - Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Dismissed*)

1938-97-U: Pamela McKechnie and Laurene Outos (Applicant) v. United Food and Commercial Workers International Union, Local 1000A and Super Centre (Loblaws Supermarkets Limited) (Respondents) v. Mike Demers (Intervener) (*Withdrawn*)

2131-97-U: Ontario Public Service Employees' Union (Applicant) v. Wabaseemoong Family Services Inc. (Respondent) (*Withdrawn*)

2165-97-U: United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. (Applicant) v. Speedy Auto Glass Limited, c.o.b. as Speedy Auto & Window Glass (Respondent) (*Withdrawn*)

2170-97-U: Ted Howard (Applicant) v. Canadian Auto Workers Union, Local 222, and General Motors of Canada Limited (Respondents) (*Dismissed*)

2367-97-U: Teamsters Local Union 91 and Roger Moran (Applicant) v. 2889218 Canada Inc., c.o.b. Exel Environmental, and Nadine Gauthier (Respondent) (*Withdrawn*)

2438-97-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Skuce Welding & Piping Ltd. (Respondent) (*Withdrawn*)

2460-97-U: George Ross Gill (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Tarmac Canada Inc. (Intervener) (*Withdrawn*)

2638-97-U: Canadian Union of Public Employees and its Local 109 (Applicant) v. The Corporation of the City of Kingston and The New City of Kingston (Respondents) (*Withdrawn*)

2661-97-U: William Walker (Applicant) v. The United Steel Workers of America (Respondent) v. Burns International Security Services Limited (Intervener) (*Withdrawn*)

2703-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Delta London Armouries Hotel (Respondent) (*Withdrawn*)

2704-97-U: Marija Valerija Zuvic (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Peel Memorial Hospital (Intervener) (*Dismissed*)

2734-97-U: Shirley Martens (Applicant) v. Ontario Nurses' Association (Respondent) v. Windsor Regional Hospital (Intervener) (*Dismissed*)

2741-97-U; 2742-97-U: Tressa L. Tadashore (Applicant) v. C.U.P.E. Local 43 (Respondent) v. The Corporation of the City of Toronto (Intervener); Tressa L. Tadashore (Applicant) v. The Corporation of The City of Toronto (Respondent) (*Dismissed*)

2782-97-U: Yllson T. Shakiri (Applicant) v. Cara Operations Limited (Respondent) (*Withdrawn*)

2912-97-U: Gerald F. Jordan (Applicant) v. Canadian Union of Public Employees Local 767 (Respondent) v. Metropolitan Toronto Housing Authority (Intervener) (*Dismissed*)

2921-97-U: Isabella Segreto (Applicant) v. CUPE Local 1356.01 (Respondent) (*Dismissed*)

2950-97-U: Constantin Freire (Applicant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Respondent) v. Lipton, a division of UL Canada Inc. (Intervener) (*Dismissed*)

2972-97-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Phonetix Intelcom (Respondent) (*Withdrawn*)

2981-97-U: Jessie Basilio (Applicant) v. Fenwick Automotive Products, United Steelworkers of America (Respondents) (*Dismissed*)

3020-97-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Best Western Highland Inn (Respondent) (*Endorsed Settlement*)

3119-97-U: Sonny Soorooj Gajadhar (Applicant) v. Service Employees International Union, Local 204 (Respondent) (*Withdrawn*)

3215-97-U: Sarbjit Mann (Applicant) v. Bakery, Confectionery and Tobacco Workers' International Union, Local 264 (Respondents) (*Withdrawn*)

3219-97-U: Office and Professional Employees' International Union, Local 225 (Applicant) v. Canadian Association of University Teachers (Respondent) (*Withdrawn*)

3228-97-U: Joan George (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Toronto East General Hospital (Intervener) (*Withdrawn*)

3301-97-U: Christian Labour Association of Canada (CLAC) (Applicant) v. Enviro-Tech Plastics Inc. (Respondent) (*Withdrawn*)

3409-97-U: Paul Piels, Jr. (Applicant) v. Tony Larocca & G.M. of Canada (Respondent) (*Withdrawn*)

3411-97-U: Paul Piels Jr. (Applicant) v. Myles Plowright & CAW Local 222 (Respondent) (*Withdrawn*)

3415-97-U: Morag Christina Myles (Applicant) v. Toronto Transit Commission and Amalgamated Transit Union (Respondents) (*Dismissed*)

3421-97-U: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and International Union of Bricklayers and Allied Craftsmen, Local 28 (Applicant) v. Cambrian Construction and Masonry Co., a division of 385310 Ontario Inc., 510015 Ontario Inc. c.o.b. as Mela Investments, Giuseppe Cotesta and Giulio Cotesta (Respondents) (*Granted*)

3425-97-U: United Steelworkers of America (Applicant) v. Provincial Security Services Ltd. (Respondent) (*Withdrawn*)

3447-97-U: United Food and Commercial Workers Union, Local 175/633 (Applicant) v. 1185727 Ontario Inc. c.o.b. as Food Basics Store #990 and The Great Atlantic & Pacific Company of Canada, Limited on its own behalf and on behalf of its Subsidiaries, Associates, Affiliates and Divisions, including, among others, Miracle Food Mart of Canada (Respondents) (*Withdrawn*)

3484-97-U: All Viewer Packer's & Custodian on day shift of Advanced Monobloc Inc. (Applicant) v. The Independent Canadian Extrusion Worker's Union of Advanced Monobloc Inc. (Respondent) (*Withdrawn*)

3542-97-U: United Food and Commercial Workers International Union, Local 1000A (Applicant) v. Banait Pharmacy Ltd. (carrying on business as Shoppers Drug Mart) (Respondent) (*Withdrawn*)

3560-97-U: Canadian Union of Public Employees, Local 79 (Applicant) v. The Corporation of the City of Toronto and the Financial Advisory Board (Respondents) (*Withdrawn*)

3571-97-U: Doba Goodman and Tony Nield (Applicant) v. Canadian Union of Public Employees, Local 3903 (Respondent) (*Dismissed*)

3574-97-U: Casey Magee and Melissa Mataseje, representing a group of employees (Applicant) v. Office and Professional Employees International Union, Local 343 (Respondent) (*Withdrawn*)

3579-97-U: Tom Giannos (Applicant) v. UFCW - Jim Hasting & Brian Noonan (Respondent) (*Dismissed*)

3587-97-U; 3590-97-U: Labourers' International Union of North America, Local 1059 (Applicant) v. The Board of Education for the City of London, Bondfield Construction Company (1983) Limited and 2820501 Canada Inc., c.o.b. as Belair Contracting (Respondents); Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicants) v. The Board of Education for the City of London, Bondfield Construction Company (1983) Limited and 2820501 Canada Inc., c.o.b. as Belair Contracting (Respondents) (*Withdrawn*)

3606-97-U: Fern Ferreira, Greg Dixon and Barry Allen (Applicant) v. Peter Norris and Ian MacDonald Local 113 A.T.U. (Respondent) (*Dismissed*)

3620-97-U: Susan Rocco, Michelle Blakely, Debra Bunn, Melaine Ortega (Applicant) v. Evantide Nursing Home and Union President Hank Beekhair and Steward Phylis Anderson (Respondent) (*Dismissed*)

3658-97-U: The Millwright District Council of Ontario United Brotherhood of Carpenters and Joiners of America on its own behalf and on behalf of Local 1916 (Applicant) v. Calorific Construction Ltd. (Respondent) (*Withdrawn*)

3674-97-U: Alan Hobbs, John Dyjach, Joe Demeyere, Wayne Husul (Applicant) v. Power Workers Union, Cupe Local 1000, all members of P.W.U. Executive Board, Chief Stewards, Jim Scavuzzo, Ed Radcliff, Rick Prudil, Ontario Hydro, Nanticoke Generating Station (Respondents) (*Dismissed*)

3676-97-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Oakdale Cleaners & Maintenance Ltd. (Respondent) (*Withdrawn*)

3733-97-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Phonettix Intelcom (Respondent) (*Withdrawn*)

3792-97-U: Maria Sousa (Applicant) v. SEIU Local 204 (Respondent) (*Dismissed*)

3796-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 385 (Applicant) v. Coca-Cola Bottling Ltd. (Respondent) (*Withdrawn*)

3829-97-U: Krystyna Urban (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union United Food and Commercial Workers, Local 351 (Respondent) (*Dismissed*)

3875-97-U: Godwin L. Cato (Applicant) v. Westin Hotel (Respondent) (*Dismissed*)

3876-97-U: Serafino Maglieri (Applicant) (*Dismissed*)

3909-97-U: Chandra Ramdharry (Applicant) v. Chelsey Park Retirement Community, and London & District Service Workers' Union, Local 220 (Respondents) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

3610-97-M: United Steelworkers of America (Applicant) v. Guardian Protection Services Ltd. (Respondent) (*Withdrawn*)

3673-97-M: Allan Hobbs, John Dyjach, Joe Demeyere, Wayne Husul (Applicant) v. Power Workers Union, Cupe Local 1000, all members of P.W.U. Executive Board, Chief Stewards, Jim Scavuzzo, Ed Radcliff, Rick Prudil, Ontario Hydro, Nanticoke Generating Station (Respondents) (*Dismissed*)

3761-97-M: Labourers' International Union of North America and Tony Guimaraes (Applicant) v. Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America and Penegal Trim and Supply Ltd. (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2706-97-M: United Food and Commercial Workers Union, Local 351 (Applicant) v. Booth Centennial Hospital Laundry (Respondent) v. Francisco Do Couto, Daysi Luytjees, Evangelos Tsekas (Objectors) (*Granted*)

JURISDICTIONAL DISPUTES

0001-97-JD: International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Electrical Power Systems Construction Association, Ontario Hydro, Labourers' International Union of North America, Local 837 (Respondents) (*Withdrawn*)

0684-97-JD: Ontario Nurses' Association (Applicant) v. Corporation of the City of Windsor (Huron Lodge) (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2492-96-OH: Ontario Public Service Employees Union, Sue Walker (Applicant) v. The Crown in Right of Ontario (Ministry of the Solicitor General and Correctional Services), Vanier Centre for Women, Lorretta Eley, Jean Lindsay, Doug Olver, Ken Davies, Francis McKinnon, Marlane Robertson, Jane MacEachern, George Serpa, Jan Clarke, Gordon Mairs (Respondent) (*Withdrawn*)

2350-97-OH: Tim Loxley (Applicant) v. All Core Rad & Tank/Div. of Auto Trend Supply Ltd. (Respondent) (*Withdrawn*)

2393-97-OH: Terrance Gerard White (Applicant) v. Paling Industries Ltd. (Respondent) (*Withdrawn*)

2561-97-OH: Bruce Graham (Applicant) v. The Salvation Army N.R.O. Ontario (Respondent) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

1898-97-U: Ontario Public Service Employees Union and its Local 656 (Applicant) v. The Board of Governors of Cambrian College of Arts and Technology (Respondent) (*Withdrawn*)

CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

2774-96-R: United Food and Commercial Workers International Union (Applicant) v. Aramco Management Limited, Aradco Management Limited (Respondents) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Intervener) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1561-96-G; 1562-96-G; 2584-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Tarmac Minerals, a Division of Tarmac Canada Inc. (Respondent) (*Withdrawn*)

2422-96-G; 3405-96-G: Labourers' International Union of North America, Local 1036 (Applicant) v. McKay Cocker Construction Limited (Respondent) (*Withdrawn*)

2449-96-G; 3071-96-G: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 114585 Canada Ltee.(carrying on business as Roch Cayer Ltd.) (Respondent); United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 114585 Canada Ltee. (carrying on business as Roch Cayer Ltd.) and 3247481 Canada Inc. (Respondents) (*Withdrawn*)

2963-96-G: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1095985 Ontario Limited o/a Urban Interior Contracting (Respondent) (*Granted*)

3077-96-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Thermotek Insulations Inc., and Fibron Insulations Inc. (Respondents) (*Withdrawn*)

4129-96-G: International Brotherhood of Electrical Workers, Local Union 402 (Applicant) v. Corbett Electric Limited Electrical & Instrumentation Constructors (Respondent) (*Granted*)

4270-96-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Steen Contractors Limited (Respondent) (*Withdrawn*)

0017-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Superior Insulation Services Inc., All Ports Insulations & Asbestos Service Ltd., Sentinel Systems Inc. and Sentinel Systems Inc., c.o.b. as Sentinel Insulation Systems (Respondents) (*Withdrawn*)

1147-97-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Kopic Wrecking Inc., A & E Enterprises (Respondents) (*Withdrawn*)

2149-97-G; 2158-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. D.F.N. Drywall and Acoustics Ltd. and Sesco Interiors Inc. (Respondents) (*Withdrawn*)

2161-97-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Charron Electric Ltd., 813842 Ontario Inc. (Respondents) (*Endorsed Settlement*)

2197-97-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. McKay-Cocker Construction Limited, Lafarge Canada Inc. (Respondents) (*Granted*)

2260-97-G: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. BFC Industrial - Nicholls Radtke (Respondent) (*Withdrawn*)

2527-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Fresco & Silva General Construction o/a F.S. General Limited (Respondent) (*Granted*)

2573-97-G: United Brotherhood of Carpenters & Joiners of America Local 494 (Applicant) v. Ryco-Alberici A Joint Venture (Respondent) (*Withdrawn*)

2960-97-G: Construction Workers Local 53, CLAC (Applicant) v. Ben Bruinsma & Sons Ltd. (Respondent) (*Withdrawn*)

3131-97-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Stacey Electric Company Limited (Respondent) (*Withdrawn*)

3278-97-G; 3279-97-G: International Union of Bricklayers & Allied Craftsmen, Local 5 (Applicant) v. The Board of Education for the City of London, Bondfield Construction Company (1983) Limited and 2820501 Canada Inc. c.o.b. as Belair Contracting (Respondents); Labourers' International Union of North America, Local 1059 (Applicant) v. The Board of Education for the City of London, Bondfield Construction Company (1983) Limited and 2820501 Canada Inc. c.o.b. as Belair Contracting (Respondents) (*Withdrawn*)

3347-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. 675602 Ontario Ltd. (Respondent) (*Granted*)

3401-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. Sutherland-Schultz Inc. (Respondent) (*Granted*)

3416-97-G: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and International Union of Bricklayers and Allied Craftsmen, Local 28 (Applicant) v. Cambrian Construction and Masonry Co., a division of 385310 Ontario Inc., and 510015 Ontario Inc. c.o.b. as Mela Investments (Respondents) (*Granted*)

3423-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. R.O.M. Contractors Inc. (Respondent) (*Endorsed Settlement*)

3433-97-G: Sheet Metal Workers' International Association, Local 235 (Applicant) v. Fraser-Vien Ltd. (Respondent) (*Granted*)

3436-97-G: Labourers' International Union of North America, Local 527 (Applicant) v. Colibri Construction Inc. (Respondent) (*Granted*)

3437-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Independent High Voltage Limited (Respondent) (*Withdrawn*)

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interfere with OPC's right to retain or instruct counsel or to extend funds for that purpose from monies paid to OPC or Ontario locals - Board also directing that collective bargaining proceed, as it has in the past, in accordance with OPC constitution, without interference by trustee or International union

ONTARIO PROVINCIAL CONFERENCE OF THE BAC, JERRY COELHO, TOM OLDHAM, KERRY WILSON, DANILO BUTTAZZONI, LUIGI SCODELLARO AND JOHN HAGGIS; RE BAC AND JOHN T. JOYCE 285

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CARRIAGE HILL HOMES, VENTARA CONSTRUCTION LTD. C.O.B. AS; RE LIUNA, LOCAL 183 147

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NATIONAL HOMES INC.; RE LIUNA, LOCAL 183 259

Employee - Certification - Dependent Contractor - Union applying to represent employees of employer operating log harvesting and hauling business - Board finding owner-operator truck driver retained by employer to be "dependent contractor" and, therefore, employee within meaning of the Act

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PORTISS, JOE; RE LIUNA, LOCAL 1089, ROBERT LEONE, RICK VANI, GERRY VARRICCHIO, FRANK GUERETTE, VICTOR HORVATH, FRANK VENNARI, RICK WEISS, ENRICO MANCINELLI

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Jurisdictional Dispute - Construction Industry - Labourers' union and Boilermakers' union disputing assignment of certain work related to removal of convection oil heater at petro-chemical plant in Sarnia - Board finding that disputed work properly assigned to Boilermakers' union

CHEMFAB MECHANICAL CONTRACTORS, LIUNA, LOCAL 1089 AND; RE BBF,
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Jurisdictional Dispute - Construction Industry - Practice and Procedure - Employer filing jurisdictional dispute complaint with Board following grievance filed by Machinists' union regarding assignment of certain work to IBEW - Machinists' union subsequently withdrawing grievance, agreeing that disputed work properly assigned to IBEW, and asking Board not to convene consultation - Employer not responding to Machinists' union request, nor moving to withdraw application - Board cancelling consultation over objection of IBEW - Board affirming that it ought not to inquire into matters of an academic, hypothetical or theoretical nature and rejecting submission that there remained any work in dispute between the parties - Board also rejecting submission by IBEW that section 99 of the Act requires Board to hold consultation in which oral argument entertained - Application dismissed

ABITIBI-CONSOLIDATED CORPORATION; RE IAM, LODGE 771 AND IBEW, LOCAL
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Jurisdictional Dispute - Construction Industry - UA and Boilermakers' union disputing assignment of certain work, including fabrication, installation, testing and welding, in connection with skid units, cold boxes, convection boxes of oil heaters, heat exchangers and vessels weighing three tons or less, piping and tubing in connection with fabrication of furnace or heater units, and tubing connected with fabrication of polyurethane reactors - Employer operating as contractor in construction industry and also operating permanent manufacturing and fabrication shop - Employer bound to both UA's and Boilermakers' provincial collective agreements in ICI sector, and to shop fabricating agreement with Boilermakers' union - Employer also having practice of applying UA provincial agreement to work performed by UA members in employer's shop - Board satisfied that disputed work not construction work and that UA does not have collective agreement covering work in dispute - Board finding that disputed work properly assigned by employer to Boilermakers' union

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Jurisdictional Dispute - Construction Industry - Practice and Procedure - Responding parties objecting to "reply brief" filed by applicant on eve of consultation - Board dismissing objection - Labourers' union and Ironworkers' union disputing assignment of work in connection with cleaning, installing and pre-tensioning of spin lock anchor bolts set in concrete in reactor vault at Bruce Nuclear Power Development - Board declaring that disputed work ought to have been assigned to members of Labourers' union

ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION,
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Practice and Procedure - Construction Industry - Construction Industry Grievance - Related Employer - Sale of a Business - Union asking Board to direct employer to produce certain documents prior to hearing of application, including list of clients and suppliers - Board making order, but imposing certain conditions - Board directing that no copies of list be made, that list be returned upon completion of proceedings, and that individuals and businesses named on list be contacted by union only through its counsel

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ONTARIO HYDRO, ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, BSOIW, LOCAL 736; RE LIUNA, LOCAL 1059 280

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Practice and Procedure - Duty to Bargain in Good Faith - Evidence - Unfair Labour Practice - OPSEU alleging that Management Board violated its duty to bargain in good faith when it failed to disclose its decision to privatize the "GO Temp" service during the previous round of collective bargaining - OPSEU seeking production of certain documents for purpose of cross-examination - Management Board objecting to production order on grounds of timeliness and Crown privilege - Timeliness objection dismissed - Board concluding that certain documents sought need not be produced on grounds of relevance and public interest immunity - Board concluding that other documents, including business plan, estimates and budget document not covered by public interest immunity - Management Board directed to deposit those documents with the Board for personal and confidential inspection by vice-chair - Those documents to be made available to OPSEU if vice-chair satisfied that they should be produced

CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY MANAGEMENT BOARD OF CABINET; RE OPSEU; RE MANPOWER SERVICES (ONTARIO) LTD., THE EMPLOYMENT AND STAFFING SERVICES ASSOCIATION OF CANADA (ESSAC), AIDA CANADA LTD., ARMOR PERSONNEL INC., BRADSON STAFFING SERVICES, DRAKE INTERNATIONAL INC., ECCO STAFFING SERVICES, IAN MARTIN LIMITED, KEITH BAGG STAFFING RESOURCES INC., KELLY SERVICES (CANADA), LTD., NURSING & HOMEMAKERS INC., OLSTEN SERVICES LIMITED, HERZING SERVICES INC., QUANTUM MANAGEMENT SERVICES LIMITED, T.E.S. CONTRACT SERVICES INC., TOSI PLACEMENT SERVICES LTD., Y&R PERSONNEL SERVICES INC., INTERIM HEALTHCARE.....

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WILLIAMS CONTRACTING LIMITED; RE IUOE, 793

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Related Employer - Construction Industry - Construction Industry Grievance - Practice and Procedure - Sale of a Business - Union asking Board to direct employer to produce certain documents prior to hearing of application, including list of clients and suppliers - Board making order, but imposing certain conditions - Board directing that no copies of list be made, that list be returned

upon completion of proceedings, and that individuals and businesses named on list be contacted by union only through its counsel

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CARRIAGE HILL HOMES, VENTARA CONSTRUCTION LTD. C.O.B. AS; RE LIUNA, LOCAL 183.....

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ONTARIO PROVINCIAL CONFERENCE OF THE BAC, JERRY COELHO, TOM OLDHAM, KERRY WILSON, DANILO BUTTAZZONI, LUIGI SCODELLARO AND JOHN HAGGIS; RE BAC AND JOHN T. JOYCE.....

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ONTARIO PROVINCIAL CONFERENCE OF THE BAC, JERRY COELHO, TOM OLDHAM, KERRY WILSON, DANILO BUTTAZZONI, LUIGI SCODELLARO AND JOHN HAGGIS; RE BAC AND JOHN T. JOYCE

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Unfair Labour Practice - Certification - Construction Industry - Interim Relief - Intimidation and Coercion - Remedies - Trusteeship - International union placing Ontario Provincial Council ("OPC") under trusteeship - Trusteeship imposed following request by OPC to Minister of Labour to remove International union from designation of employee bargaining agency and application to Board by OPC under section 154 of the Act to be certified to represent provincial bargaining unit (and to thereby displace the designated employee bargaining agency which includes the International union) - OPC alleging that trusteeship violating various provisions of the Act, including Bill 80 provisions, and seeking interim relief - Board making interim order directing International union to cease and desist from interfering with unfair labour practice proceeding or with section 154 application before the Board - Board directing International union not to interfere with OPC's right to retain or instruct counsel or to extend funds for that purpose from monies paid to OPC or Ontario locals - Board also directing that collective bargaining proceed, as it has in the past, in accordance with OPC constitution, without interference by trustee or International union

ONTARIO PROVINCIAL CONFERENCE OF THE BAC, JERRY COELHO, TOM OLDHAM, KERRY WILSON, DANILO BUTTAZZONI, LUIGI SCODELLARO AND JOHN HAGGIS; RE BAC AND JOHN T. JOYCE

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Unfair Labour Practice - Change in Working Conditions - Discharge - Judicial Review - OSSTF applying to represent certain school board employees ten days after Board terminated bargaining rights held by OPEIU in respect of those employees - Employer discharging bargaining unit employee after OSSTF certified but before first collective agreement made - OSSTF alleging that discharge violating statutory freeze - Board declining to inquire into application on ground that OSSTF had failed to make out prima facie case and because inquiry would not serve labour relations purpose of statutory freeze - Application for judicial review dismissed by Divisional Court

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Unfair Labour Practice - Collective Agreement - Final Offer Vote - Interference with Trade Unions - Interim Relief - Intimidation and Coercion - Remedies - Strike - Union alleging that employer's various unfair labour practices led striking employees to vote in favour of final offer vote -

Union asking for interim order restricting employer from taking any steps to implement final offer - Application for interim order dismissed

MAPLE LEAF PORK, A DIVISION OF MAPLE LEAF MEATS INC.; RE UFCW, LOCAL 1227

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Unfair Labour Practice - Construction Industry - Duty of Fair Representation - Intimidation and Coercion - Practice and Procedure - Witness - Applicants seeking to withdraw unfair labour practice complaints due to alleged threats to witnesses - Board not permitting applicants to withdraw and directing them to file particulars of alleged threats within 10 days

PORTISS, JOE; RE LIUNA, LOCAL 1089, ROBERT LEONE, RICK VANI, GERRY VAR-
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CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY MANAGEMENT BOARD OF
CABINET; RE OPSEU; RE MANPOWER SERVICES (ONTARIO) LTD., THE EMPLOY-
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INTERNATIONAL INC., ECCO STAFFING SERVICES, IAN MARTIN LIMITED, KEITH
BAGG STAFFING RESOURCES INC., KELLY SERVICES (CANADA), LTD., NURSING &
HOMEMAKERS INC., OLSTEN SERVICES LIMITED, HERZING SERVICES INC.,
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Unfair Labour Practice - Duty to Bargain in Good Faith - Intimidation and Coercion - Strike - Union alleging that employer committing various unfair labour practices in its response to lawful strike - Board dismissing allegation that various communications by employer to striking employees amounting to unlawful intimidation - Board finding that employer engaging in hard bargaining and not bargaining in bad faith - Board dismissing allegation that use of replacement workers offending prohibition on use of professional strike-breakers - Board also dismissing allegation that failure of employer to agree to union's proposal to pay for and maintain benefits during strike unlawful - Application dismissed

COMCARE (CANADA) LIMITED; RE ONA

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Unfair Labour Practice - Duty of Fair Representation - Union negotiating change to seniority provisions of collective agreement to give seniority status to individuals hired through temporary service agencies - Union not explaining effect of new collective agreement at ratification meeting - Union providing Board with no explanation for why it failed to inform membership about potential effect on seniority list, or its rationale for reaching this understanding with employer - Board finding union's conduct arbitrary - Application alleging violation of union's duty of fair representation allowed

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3317-97-JD Abitibi-Consolidated Corporation, Applicant v. International Association of Machinists and Aerospace Workers, Lodge 771 and International Brotherhood of Electrical Workers, Local 1744, Responding Parties

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Employer filing jurisdictional dispute complaint with Board following grievance filed by Machinists' union regarding assignment of certain work to IBEW - Machinists' union subsequently withdrawing grievance, agreeing that disputed work properly assigned to IBEW, and asking Board not to convene consultation - Employer not responding to Machinists' union request, nor moving to withdraw application - Board cancelling consultation over objection of IBEW - Board affirming that it ought not to inquire into matters of an academic, hypothetical or theoretical nature and rejecting submission that there remained any work in dispute between the parties - Board also rejecting submission by IBEW that section 99 of the Act requires Board to hold consultation in which oral argument entertained - Application dismissed

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. Knight* and *G. McMenemy*.

DECISION OF THE BOARD; April 17, 1998

1. This is an application made by Abitibi-Consolidated Corporation (hereinafter "the employer") pursuant to section 99 of the *Labour Relations Act, 1995* (hereinafter "the Act"). The application raises for determination a work assignment dispute raised initially by the International Association of Machinists and Aerospace Workers, Lodge 771 (hereinafter "Lodge 771") in the form of a grievance dated June 27, 1996. As will be described in more detail below, the work in dispute was performed by members of the International Brotherhood of Electrical Workers, Local 1744 (hereinafter "Local 1744").

2. A consultation before the Board to deal with the application on its merits was scheduled for March 25, 1998. On March 23, 1998, this panel of the Board cancelled the consultation by way of Board endorsement, and indicated that a decision of the Board would be forthcoming. This is that decision.

3. The circumstances surrounding the cancellation of the consultation are somewhat unusual. The employer described the work in dispute in its application as "the repair work associated with the R-8 Chiller Heat Exchanger tubing". It filed a brief with the Board which described, in great detail, the work performed by members of Local 1744 on the R-8 Chiller during the time period complained of by Lodge 771. It is significant to note that the grievance initially filed with the employer by Lodge 771 described that union's complaint as the wrongful assignment of "work relating to the R-8 Chiller unit".

4. Local 1744 filed a brief in response to the application filed by the employer. For the most part, it echoes the arguments raised by the employer for upholding the assignment of the work in dispute to members of Local 1744. There is one notable difference, however, in the brief filed by Local 1744, and that is the description of the work in dispute. In Local 1744's brief, it is described thusly:

All work in connection with the service, repair and maintenance of all stationary refrigeration units containing regulated refrigerants, including but not limited to the R-8 Chiller cooling process water in Bleach Plant operations (the work in dispute) at the Fort Francis (sic) Paper Mill (the "Mill").

5. The brief filed by Lodge 771 was filed approximately 6 weeks later, on March 3, 1998, in response to an endorsement of the Board (differently constituted) dated February 20, 1998, which required that pleading to be filed, in lieu of which the application would be determined by reference

only to the pleadings filed with the Board to date. In its submissions filed with the Board, Lodge 771 argued that the Board need not convene a consultation in this application, as there was no longer a dispute between the parties.

6. In that regard, it appears from the brief filed by Lodge 771 that its underlying grievance dated June 27, 1996 was withdrawn by the union by way of letter from counsel dated March 2, 1998. Counsel proceeded to make the following submissions in the brief filed on behalf of Lodge 771:

IAM Lodge 771 has withdrawn the R-8 Chiller grievance.... The work in dispute is not likely to reoccur since it had not occurred previously for many years. In any event, were it to reoccur, it would not be in dispute. IAM Lodge 771 agrees that the assignment of work and the repair of the R-8 Chiller heat exchange tubing unit was properly given to IBEW Local 1744 as set out in paragraphs 10 - 17 of the Applicant's brief. IAM Lodge 771 also agrees with the description of the work performed by its members on said unit, set out in paragraphs 14 and 24 of the Applicant's brief, which work has never been in dispute.

The brief proceeds to outline the argument relied upon by Lodge 771 for the proposition that the Board ought not to proceed to convene a consultation in this case. Counsel brought to the attention of the Board the decisions of *E.S. Fox Limited*, [1990] OLRB Rep. May 504; *Magna International Inc.*, [1987] OLRB Rep. April 742; *Felix Lopes Sheet Metal Ltd.*, [1992] OLRB Rep. June 706; and *Boise Cascade Canada Ltd.*, [1992] OLRB Rep. Feb. 127.

7. The employer did not respond to or comment on the submissions of Lodge 771. Nor did it move to withdraw this proceeding. However, counsel for Local 1744 wrote to the Board on March 12, 1998. Counsel disagreed that the consultation ought to be cancelled. His submissions are dealt with below in some detail. Suffice it to say, at this stage, that after reviewing the submissions made by counsel for Local 1744 this panel of the Board was of the view that they had very little merit, and thus we cancelled the consultation on March 23, 1998.

8. It would be helpful, at this stage, to set out the relevant portions of section 99 of the Act:

- (1) This section applies when the Board receives a complaint,
 - (a) that a trade union or council of trade unions, or an agent of either was or is requiring an employer or employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another;
 - (b) that an employer was or is assigning work to persons in a particular trade union rather than to persons in another; ...
- (2) A complaint described in subsection (1) may be withdrawn by the complainant upon such conditions as the Board may determine.
- (3) The Board is not required to hold a hearing to determine a complaint under this section.
- (4) Representatives of the trade union or council of trade unions and of the employer or employers' organization or their substitutes shall promptly meet and attempt to settle the matters raised by a complaint under clause (1)(a) or (b) and shall report the outcome to the Board.
- (5) The Board may make any interim or final order it considers appropriate after consulting with the parties.

9. In essence, counsel for Local 1744 submits that the scope of section 99 of the Act is broader than its predecessors, and requires the Board to hold a consultation in which we would entertain oral argument. Counsel notes that section 99(1)(b) of the Act does not require a demand for work or for

“particular work” before a complaint can be filed with the Board. Instead, it is submitted, the section applies when the Board receives a complaint “that an employer was or is assigning work to persons in a particular trade union rather than to persons in another”. Counsel states that this means that “the focus of the Board under section 99 is no longer restricted to the specific application of the work assignment dispute in question between the parties but [the Board] may be asked to determine the broader question of work assignment in all its applications to the bargaining relationships between the parties”. Because the Board’s jurisdiction is not tied to a demand for work, as it would be if the application were based on section 99(1)(a) of the Act, “the Board may deal with the entirety of all aspects of a work assignment dispute and need not focus only upon ‘particular work’ ‘demanded’ or ‘required’ by the trade union”.

10. Counsel for Local 1744 also argues that section 99(3) of the Act requires the Board to determine the complaint before it, although the Board need not hold a hearing to do so. Instead, a consultation may be held under the Act. However, counsel further submits that section 99(5) of the Act requires, at minimum, that a consultation be held with the parties and that a determination be made by the Board with respect to the substance of the complaint. Counsel concludes this branch of his written argument by stating that “the Board must convene its consultation proceeding and make a determination with respect to the merits of the matter.”

11. Counsel for Local 1744 also sought to distinguish the case authorities relied upon by counsel for Lodge 771. As well, he brought the following decisions to the attention of the Board: *Comstock Canada*, [1993] OLRB Rep. Aug. 740; *Dafoe Floor Concrete Construction Ltd.*, [1994] OLRB Rep. July 836; and *Vic-West Steel*, [1993] OLRB Rep. Mar. 256. We have carefully reviewed and considered those case authorities.

12. In response to these submissions, counsel for Lodge 771 filed brief submissions with the Board. We do not intend to set them out herein, because for the most part they correspond with our view which is set out immediately below.

13. We start our analysis from the proposition that it makes no sense to expend the limited resources of the Board on matters which are no longer in dispute. That is, that except in the most exceptional of circumstances, matters which are moot, hypothetical, academic or theoretical ought not to be the subject of litigation. In our view, a number of the Board decisions relied upon by Lodge 771 establish this proposition. In *E.S. Fox Limited*, cited above, the Board said this, with which we agree:

14. The Board is an adjudicative tribunal, not an advisory body (except where the statute specifically enables the Minister to refer to the Board any question that arises with respect to the Minister’s authority to make an appointment under sections 16, 44 or 45 of the Act). Accordingly, the Board does not normally embark upon inquiries into academic or hypothetical questions...

17. It is fundamental to a complaint concerning the assignment of work that there be a dispute concerning the assignment of some specific work. Where there is no demand that some specific work be assigned in the manner different from the way it was assigned, there is no continuing dispute concerning the assignment of work and no jurisdictional dispute which is appropriate for the Board to inquire into in the absence of extraordinary circumstances...

18. In this complaint, the demand that the assignment that the work described in paragraph 4 above be changed came in the form of the grievance which has since been withdrawn. Accordingly, there is no longer any trade union which is requiring that that work assignment be changed.

14. Likewise, in *Felix Lopes Sheet Metal Ltd.*, cited above, the Board made the following comments, at paragraph 5:

Nevertheless, the Board agrees with the recent trend of Board decisions, where the Board has been loathe to litigate matters as jurisdictional disputes unless it is necessary to do so, and even then, only when it becomes so necessary. Cases are not automatically deferred to the filing of a

jurisdictional dispute until it is appropriate to hear the particular dispute in that fashion. We do not imply in any way by this comment that a section 126 application is the appropriate vehicle for resolving work assignment disputes between two unions. Rather, section 93 remains the appropriate vehicle for the litigation resolution of such disputes.

Here, there is no remaining work assignment dispute between the two trade unions in this proceeding. A crystallized dispute may again arise in the future but it can be dealt with in the future. Given this, the Board will not proceed further with this complaint: see, for example, *J.R. Mechanical Inc.*, [1991] OLRB Rep. Aug. 999. The Board has a discretion under section 93 to entertain a complaint. We are satisfied here that it is not appropriate to exercise that discretion to hear the merits of the complaint. The grievance giving rise to this particular jurisdictional dispute has been resolved, and there is no outstanding dispute with respect to the particular assignment in question which would justify this matter proceeding further. To go ahead with the complaint in these circumstances would as well be a disincentive to the settlement process. Accordingly, the Board will proceed no further with the instant complaint.

We agree with these sentiments as well. The case authorities establish the proposition that matters of an academic, hypothetical or theoretical nature will not be litigated by the Board, except in the most exceptional of circumstances. As noted above, we start our analysis with this principle in mind.

15. Counsel for Local 1744 asserts that the above-referenced decisions of the Board must be reviewed with caution, as they were decided in the context of narrower work assignment provisions contained in previous versions of the Act. We disagree with the breadth of that statement. Without a doubt, as noted by the Board in *Comstock Canada*, cited above, the jurisdictional dispute resolution mechanism contained in the current Act is preferable than the method provided for under the pre-1993 legislation. It is also true - in contrast to the pre-1993 situation - that much of the cost in litigating work assignment disputes has been incurred by the parties by the time that their briefs are filed with the Board, and that the jurisprudence pre-dating the consultation process is of limited relevance - "to the extent that it deals with potential costs of proceeding with the application" (see paragraph 4 of *Comstock Canada*, cited above).

16. However, that does not lead us to conclude that cost is no longer a factor to be taken into account. Even the appearances at the Board for a one day consultation cost the parties legal fees for both preparation and attendance, as well as out-of-pocket expenses for attendance and the opportunity costs of same. In the instant case, for example, the parties would have been put to the time and expense of sending representatives from Fort Frances to Toronto for the purpose of attending before the Board. Added to all of these costs is the cost to the Board of convening a panel to hear the submissions of the parties. Accordingly, it is fair to say that, to some extent, the older case authorities are no longer on point when they speak of the large expenditures incurred in work assignment applications. However, cost is still a factor that cannot be ignored.

17. Counsel for Local 1744 asserts that the work assignment dispute between the parties remains, even after the withdrawal of the grievance by Lodge 771. In support of his assertion, counsel relies upon the authority of *Vic-West Steel*, [1993] OLRB Rep. March 256. We disagree with this proposition. In *Vic-West Steel*, the Board faced a jurisdictional dispute which had proceeded through some ten days of hearing. During the course of the hearing, the underlying grievance (which had been filed by the Carpenters' union) was settled as between the company and that union, and the Carpenters' requested that the Board terminate the jurisdictional dispute proceedings on the basis that the demand for the work which was at the core of the complaint no longer existed. The Board refused to do so.

18. In reaching its decision, the Board noted that the jurisdictional complaint before it had been filed by the Sheet Metal Workers - not the same union that had filed the underlying grievance - and therefore constituted, itself, a "claim" to the work in dispute. Furthermore, the Board noted that the Carpenters' union - notwithstanding their settlement of the grievance - specifically stated that it did not

withdraw, amend or resile from any of the assertions or claims it had made in the work assignment proceeding. As the Board noted at paragraph 82 of its decision:

Further, it was readily apparent that there was still a jurisdictional dispute between the Sheet Metal Workers and the Carpenters, both specifically with respect to the work in dispute herein and more generally with respect to the handling and installation of sheet metal siding in Lambton County.

19. In distinguishing (but, with one reservation, agreeing with) the decision of the Board in *E.S. Fox* (cited above), the Board noted, at paragraph 83, that in the latter case the hearing on the merits had not commenced at the time of the decision. Furthermore, “it was not apparent that there was any continuing jurisdictional dispute which had to be resolved, and the Board was satisfied that there was no labour relations or other reason to continue with that complaint”. In contrast, in *Vic-West Steel* “it was apparent that the work in dispute continued to be a source of conflict between [the unions]. Further, the Sheet Metal Workers wanted the dispute resolved”. As well, the Board was not satisfied that the company and the Carpenters’ union ought to be permitted to unilaterally end proceedings instituted by the Sheet Metal Workers. The Board also noted that it was evident that the Carpenters’ union was merely attempting to avoid what it perceived “should be a negative result for it in this matter”.

20. It is clear that the *Vic-West Steel* decision is distinguishable from the case before the Board. In the instant case, the litigation of the proceeding has not started. Furthermore, our view, which will be outlined in more detail below, is that there is no longer any work in dispute between the parties. There is no labour relations or other reason to continue with this complaint evident on the materials before the Board, or identified in the submissions of counsel. It may well be that Lodge 771 was of the view that it did not have a persuasive case in the work assignment application. However, that is not a legitimate reason on its own to preclude the early termination of this proceeding. As noted by the Board in *Felix Lopes Sheet Metal Ltd.*, cited above, the Board sees no reason to create a disincentive to settle this type of application.

21. As noted above, we do not believe there to be any work in dispute remaining amongst the parties, on the evidence before us. In reaching that conclusion, we reflect a fundamental difference in our interpretation of section 99 of the Act, as compared to that held by counsel for Local 1744.

22. At its very core, section 99 of the Act focuses upon a dispute by two or more trade unions over the assignment of work. That this is the fundamental underpinning of section 99 is obvious. Whether one considers the more specific wording of section 99(1)(a) of the Act, or the more general wording of section 99(1)(b) of the Act, the focus in each of the two subsections is the same - there must be an assignment of work by an employer which some entity (almost certainly a trade union) complains about.

23. Counsel for Local 1744 relies upon the relatively broader wording of section 99(1)(b) of the Act to support the proposition that the Board can, in a work assignment application, “determine the broader question of work assignment in all its applications to the bargaining relationships between the parties”. This proposition is entirely without merit. In fact, taken to its logical extreme, it makes no sense at all.

24. The facts of this proceeding make for a useful example. The employer has defined, as the work in dispute, “the repair work associated with the R-8 Chiller Heat Exchanger tubing”. This description of the work in dispute marries up nicely with the grievance filed by Lodge 771 and clearly is an accurate description of what it was that Lodge 771 believed was misassigned by the employer. Local 1744, on the other hand, describes the work in dispute far more broadly, to encompass all work in connection with the service, repair and maintenance of all stationary refrigeration units containing regulated refrigerants, including, but not limited to, the R-8 Chiller. This description is not an accurate

description of the work which Lodge 771 asserted was misassigned by the employer. There has never been any suggestion by any party that Lodge 771 claimed any work ("service", repair or "maintenance") relating to "stationary refrigeration units" other than the R-8 Chiller. At the very least, Lodge 771 has never claimed that work in any of the materials before us.

25. Local 1744 obviously desires to utilize this proceeding - launched by the employer to deal with its assignment of work relating to a specific refrigeration unit - to obtain a Board determination on a far broader, far different matter. As noted above, there is nothing before the Board to suggest that that broader matter has ever been the subject of a dispute amongst the parties. In such circumstances, there is absolutely no basis upon which a Board determination on that matter must be provided. Even the broader language contained in section 99(1)(b) of the Act does not support the approach urged by counsel for Local 1744. The complaint received by the Board was, in substance, that the employer was assigning "the repair work associated with the R-8 Chiller Heat Exchanger tubing" to members of the wrong union. The language in section 99(1)(b) does not, no matter how one attempts to read it, support the proposition that one of the parties to a work assignment dispute can unilaterally transform a legitimately narrow dispute into one of far greater magnitude. Put another way, section 99(1)(b) of the Act does not create a free-standing right for one party to a work assignment dispute to fashion its own broader focus of litigation and unilaterally foist it upon the other parties to the proceeding where that broader litigation has never been a matter in dispute amongst the parties.

26. In this proceeding, counsel for Local 1744 asserts that the complaint filed by the employer "is not restricted to 'particular work' in relation to the R-8 Chiller but focuses upon the performance of Work Functions in relation to refrigeration work and not particular equipment". He notes that his client's response to the application did so as well, and concludes that the Board has therefore received a complaint under section 99(1)(b) that requires determination.

27. That is not in fact the case. As noted above, the description of the work in dispute relied upon by the employer in this proceeding is quite narrow in scope - "the repair work associated with the R-8 Chiller heat exchanger tubing". The employer does mention, in great detail, its own practice of assigning similar work with respect to other refrigeration equipment to members of Local 1744 - but only as evidence of "employer practice", and not as the locus of the work assignment application. Accordingly, it is not accurate at all to rely upon that broader focus to ground a claim that the "work in dispute" is described in a wide fashion. It is clearly not.

28. Furthermore, it is quite evident that Local 1744 has not, itself, filed a complaint with the Board regarding the assignment of "all work in connection with the service, repair and maintenance of all stationary refrigeration units containing regulated refrigerants...". It would appear that there has never been any issue at all as between the parties regarding this work. There certainly is nothing before the Board suggesting otherwise. Accordingly, we do not accept that the wording of section 99(1)(b) of the Act permits Local 1744 to unilaterally broaden the scope of the Board's inquiry in this proceeding.

29. We now consider the submission by counsel that there is no option but for the Board to "convene its consultation proceeding and make a determination with respect to the merits of the matter". As noted above, we disagree with this proposition as well.

30. First, it is evident from the provisions of section 99(3) of the Act that counsel for Local 1744 is quite right when he observes that the Board is no longer required to hold a hearing to determine jurisdictional disputes. The Act is quite clear in that regard. He is also quite right when he observes that the Board is empowered to make any interim or final orders with regard to a work assignment application after consulting with the parties. That, too, is quite obvious from the plain wording of section 99(5) of the Act.

31. But it does not follow, at all, that the Board has no option, upon receipt of a work assignment application, but to convene an oral consultation with the parties and to make a determination with respect to the merits of the application, in the absence of a withdrawal request by the applicant in accordance with section 99(2) of the Act. The term “consulting”, which is used in section 99(5) of the Act, is not a defined term in the Act. We are of the view that inherent in that concept is wide latitude in how work assignment applications may be disposed of by the Board. Surely, for example, the Board could dispose of an application (on the merits or, as in this case, on the basis that a dispute no longer exists) upon the full written submissions of the parties.

32. Oddly enough, counsel for Local 1744 seems to acknowledge this himself. The first submission he makes to the Board in his letter of March 12, 1998 is that, because Lodge 771 did not file any submissions respecting the merits of the jurisdictional dispute in its filings of March 3, 1998, “...Lodge 771 ought to be given no further opportunity to make any further submissions in this regard. The Board may therefore determine the merits of this dispute and issue the appropriate orders on the filings of the parties”. Counsel for Local 1744 was not urging that an oral consultation be convened in those circumstances. This makes sense to us. It would seem entirely unnecessary, in certain cases, to convene an oral consultation. Rule 76 of the Board’s Rules of Procedure anticipate just such an occurrence. The Board may well be in a position to determine the merits of a work assignment application on the basis of the briefs filed by the parties, and in those circumstances it can do so without the need for oral representations by counsel or representatives of the participants.

33. That this is the only rational conclusion that can be reached on the wording of section 99 of the Act is buttressed by the terms of section 99(4) of the Act, which was not commented upon by counsel for Local 1744. Section 99(4) provides that upon a complaint being filed with the Board under section 99(1)(a) or (1)(b) of the Act, representatives of the trade unions and the employer “shall promptly meet and attempt to settle the matters raised” by the application. We suspect that such meetings rarely, if ever, happen in practice, but the legislation directs such a meeting in each case, and presumably anticipates that such a meeting could result in a settlement of the issue in dispute. On the theory of Local 1744, however, the Board could not issue an order reflecting such a settlement, if such an order was all or part of the resolution of the matter agreed to by the parties. Instead, on the theory of Local 1744, the Board would be required to convene an oral consultation in order to receive the settlement. This makes very little practical sense.

34. For these reasons, it is clear to us that it is not necessary for the Board to convene an oral consultation before disposing of a work assignment dispute filed with the Board. The Board can dispose of any such application without convening such a consultation if it is of the view that the materials filed with the Board are sufficient to do so. It may well be that such cases will be rare, and it is the experience of the Board that the oral submissions of the parties (as may be narrowed by the panel of the Board seized with the proceeding) are helpful in reaching a proper disposition of work assignment disputes. However, if the parties to a jurisdictional dispute agree on the factual basis underlying the dispute, there can be no doubt that the Board may determine the proceeding without an oral consultation. The written submissions of the parties will constitute “consulting with the parties” in and of itself.

35. Applying this approach to section 99 of the Act to the circumstances of this application, we were quite satisfied that it was unnecessary to convene an oral consultation in order to deal with the merits of the application, in light of the withdrawal of the underlying grievance by Lodge 771. As noted above, we are satisfied that the work assignment disagreement which lies at the core of this dispute no longer exists, and that if the work in dispute were to arise again, Lodge 771 has acknowledged that an assignment of work of a similar nature by the employer to Local 1744 would not be challenged. In those circumstances, it makes no sense to proceed to hear the submissions of the parties, particularly when the parties were required to attend in Toronto from Fort Frances, Ontario.

36. Accordingly, by way of Board endorsement dated March 23, 1998, we cancelled the consultation scheduled for March 25, 1998. In the circumstances, this application is dismissed.

1474-97-R Labourers' International Union of North America, Applicant v. Baghai & Cho Incorporated, Responding Party

Certification - Construction Industry - Union withdrawing certification application after representation vote taken, but asserting that no bar should apply - Board rejecting union's submission that section 7(10) of the Act does not apply to construction industry applications - Board imposing one year bar on new application from union

BEFORE: *D. L. Gee*, Vice-Chair.

APPEARANCES: *John Moszynski, Durval Terceira and Luis Camana; Joseph Liberman and Sheryl Johnston* for the responding party.

DECISION OF THE BOARD; March 23, 1998

1. The style of cause is hereby amended to refer to the responding party as: "Baghai & Cho Incorporated".

2. This matter is an application for certification under the construction industry provisions of the *Labour Relations Act, 1995* (the "Act").

3. Pursuant to the Board's direction of August 1, 1997, on August 6, 1997, a representation vote was taken of the individuals in the following voting constituency:

all carpenters and carpenters' apprentices in the employ of The Shane Baghai Group in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

4. Two individuals cast ballots. The responding party challenged the entitlement of both individuals to vote on the basis that they were independent contractors and not employees. A hearing was held for the purpose of hearing the parties' evidence and submissions into the status of the two individuals in dispute. During the course of the hearing, it became apparent that, even if the applicant was successful with its assertion that the two individuals were employees of the responding party, one of the individuals would be excluded from the unit on the basis that he exercised managerial functions. As a result, the applicant advised the Board that it wished to withdraw the application.

5. An issue then arose as to whether the Board should impose a bar on the applicant's ability to file another application for certification with respect to employees in the proposed bargaining unit. The applicant was given until March 12, 1998 to file any submissions it wished the Board to consider on this issue. The responding party was given until March 19, 1998 to file its submissions. The Board is in receipt of submissions from the applicant. No submissions have been received from the responding party.

6. Section 7(10) of the Act provides as follows:

7. • • •

(10) If the trade union withdraws the application after the representation vote is taken, the Board shall not consider another application for certification by the trade union as the bargaining agent of the employees in the proposed bargaining unit until one year has elapsed after the application is withdrawn.

The applicant submits that section 7(10) does not apply to this application on the basis that sections 153 to 167 constitute a complete code which is to govern construction industry certification applications and that there is no equivalent to section 7(10) in sections 153 to 167.

7. It is the Board's determination that section 7(10) applies to construction industry certification applications. Section 152 of the Act stipulates that sections 7 to 63 and 68 to 144 of the Act do not apply where *there is a conflict* with sections 153 to 167. As indicated above, sections 153 to 167 are silent as to whether a bar is to be applied where a trade union withdraws an application for certification following the taking of a representation vote but prior to the counting of the ballots. There is thus no "conflict" between section 7(10) and any of the provisions of sections 153 to 167 such that section 7(10) applies.

8. Having regard to the foregoing, this application is hereby withdrawn by leave of the Board. The Board will not consider another application for certification by the trade union as bargaining agent of the employees in the proposed bargaining unit until one year has elapsed from the date of this decision.

9. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

10. The responding party is directed to post copies of this decision immediately, adjacent to the "Notice to Employees of Application and of Vote" posted previously. These copies must remain posted for a period of 30 days.

2004-97-R Labourers' International Union of North America, Local 183, Applicant v. Ventara Construction Ltd. c.o.b. as **Carriage Hill Homes**, Responding Party

Certification - Construction Industry - Discharge - Discharge for Union Activity - Remedies - Unfair Labour Practice - Union applying to represent bargaining unit of construction labourers - After certification application filed, but before vote held, union supporter advised that he was no longer working for construction company employer, but instead for a framing contractor on the work site - Board finding that employee discharged contrary to the Act and that reliability of ballot box as indicator of employees' true wishes destroyed - Board directing certification of the union under section 11 of the Act

BEFORE: *Inge M. Stamp*, Vice-Chair.

APPEARANCES: *M. Lewis, A. Bremner, L. Torres and J. Vala* for the applicant; no one appearing for the responding party.

DECISION OF THE BOARD; April 23, 1998

1. This is an application for certification pursuant to the construction industry provisions of the Act. A vote was held and the ballot box was sealed pending resolution of all outstanding issues.

2. A hearing in this matter was held on Monday, February 16, 1998. Prior to the hearing counsel for the responding party advised the Board by letter dated February 13, 1998 that the responding party would be representing itself. On the day scheduled for hearing no one appeared on behalf of the responding party. The Board waited its customary half hour before proceeding.

3. The applicant wished to proceed and called its evidence with respect to all outstanding issues including a request for relief under section 11(1) of the Act. Section 11(1) of the Act provides as follows:

11.(1) Upon the application of a trade union, the Board may certify the trade union as the bargaining agent for the employees in a bargaining unit in the following circumstances:

1. An employer, employers' organization or person acting on behalf of an employer or employers' organization has contravened the Act.
2. The result of the contravention is that a representation vote does not or would not likely reflect the true wishes of the employees in the bargaining unit about being represented by the trade union.
3. No other remedy, including the taking of another representation vote, is sufficient to counter the effects of the contravention.
4. The trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board to be appropriate for collective bargaining.

• • •

4. The issues in dispute are 1) the correct name of the responding party, 2) the status of Mark Simpson and Jason McDonald; the allegations relating to the section 11 application.

5. The Board heard the evidence of Peter Langer, Allan Bremner and Luis Torres.

6. The responding party, in its submissions prior to the hearing, asserts the correct name of the employer is Ventara Construction Limited. The applicant asserts it should be Ventara Construction Ltd. c.o.b. as Carriage Hill Homes.

7. Peter Langer testified he was hired as a construction labourer by Mel Joudry, the site superintendent in Barrie. Mr. Joudry told him he would be working for Carriage Hill Homes. The Pick-up truck, van and site trailer displayed the name Carriage Hill Homes. The name Ventara Construction Ltd. appeared on Mr. Langer's paycheque.

8. In the absence of any evidence to the contrary the Board finds the name of the responding party is Ventara Construction Ltd. c.o.b. as Carriage Hill Homes.

9. The applicant challenged the inclusion of Mike Simpson on the list of employees on the basis that Mr. Simpson was not performing bargaining unit work on the date of application. It is the uncontested evidence of Peter Langer that Mike Simpson is a service manager and did not perform any bargaining unit work on the application date. Peter Langer's evidence disputes the assertions made by the responding party in its written submissions prior to the hearing that Mr. Simpson did any construction labourers' work on the application date. Having regard to the uncontradicted evidence before the

Board I find Mike Simpson was not performing bargaining unit work on the application date and is therefore not eligible to vote.

10. The responding party in its written submissions asserts Jason McDonald at all material times was an employee of P. A. Builders, a carpentry construction company and received all of his pay cheques from P. A. Builders.

11. Again, the uncontradicted evidence from Peter Langer establishes that Jason McDonald was hired as a construction labourer by the responding party. He was hired by Mel Joudry in the responding party's site trailer in the presence of Peter Langer. The site superintendent told Jason to come in the next morning and start and if he worked out for the next couple of days he had the job. It is Peter Langer's evidence that he and Jason McDonald worked together and were supervised by Mr. Joudry. Peter Langer testified he was training Jason to be his replacement as he was planning on leaving. Jason McDonald was hired around the middle of August. According to Peter Langer Jason McDonald was not supervised by P. A. Builders. Their joint time card was filled out by the responding party's site superintendent, Mel Joudry. Peter Langer saw the time sheets showing his and Jason's hours.

12. Allan Bremner, Business Representative of Local 183, testified about his involvement in the organizing campaign and in particular about the section 11 allegations.

13. Prior to the notice being posted Jason McDonald had no reservations about talking to the union. He attended a meeting offsite with the union. After the notice went up and before the vote took place Jason McDonald became wary of talking to the union. It became difficult for the union to reach Mr. McDonald either by phone or at his home.

14. When Mr. Bremner talked to Jason McDonald at the jobsite Jason McDonald told him that he no longer worked for Carriage Hill Homes but he was supposed to be working for Perry, the framing contractor P. A. Builders. Jason McDonald advised Mr. Bremner that Mel told him he was working for P. A. Builders. The applicant attempted to serve a summons to appear at the hearing on Mr. McDonald but was unable to locate him.

15. Luis Torres, a business representative of Local 183, testified with respect to the time he spent on the application date on the site. He testified he saw Peter Langer and Jason McDonald perform bargaining unit work on the application date. Mr. Torres identified the photographs he took on the application date showing Mr. Langer and Mr. McDonald at work. He testified he was on site off and on for about 4 to 5 hours. Jason McDonald told Mr. Torres when they first met that he was working for Carriage Hill Homes. Luis Torres was on site on the application date to make sure there are employees working in the bargaining unit on the application date.

16. On the application date Mike Simpson arrived in a red van in the afternoon and went into the construction office. Luis Torres left the site around 4:30 p.m. He did not see Simpson come back out from the office. It is Mr. Torres' evidence that while he was on site Mike Simpson did not perform any construction labourers' work.

17. After the certification application and before the vote Luis Torres had a conversation with Jason McDonald. Jason was concerned about losing his job. Jason said he was hired by Carriage Hill Homes. Jason was confused. Mel Joudry now told him he was working for Perry. It was Luis Torres' evidence that Jason was not happy with this situation and was afraid of losing his job. Since that conversation Jason McDonald has not returned the applicant's phone calls. After the vote Mr. Torres talked to Jason McDonald who told him he was doing labourers' work for Perry (P. A. Builders).

18. The applicant submits the evidence is clear that Jason McDonald was hired by Carriage Hill Homes, the builder. He was hired by Carriage Hill Homes' site superintendent, Mel Joudry. Prior to the application Mr. McDonald had no reservation about speaking to the union. He believed his employer was Carriage Hill Homes. Then suddenly he is no longer an employee of the builder Carriage Hill Homes but an employee of the framer who is a subcontractor on the site.

19. The applicant asserts pursuant to section 72 and section 96 of the Act the onus in this case rests on the employer to show why Jason McDonald was no longer employed by Carriage Hill Homes. He was hired by Carriage Hill Homes' site superintendent to work as a construction labourer. After the application for certification was made and before the vote took place, Jason McDonald was told by Mel Joudry he did not work for Carriage Hill Homes, he was working for P. A. Builders. The responding party in its pleadings, filed prior to the hearing, takes the position that Jason McDonald worked for P. A. Builders at all times.

20. In the circumstances the union asserts the only conclusion to be drawn from the *viva voce* evidence and the responding party's pleadings is that Jason McDonald was terminated from Carriage Hill Homes and put on the payroll of P. A. Builders. This was part of the builder's threat to subcontract out the labourers' work if the responding party gets certified. Mr. McDonald was hired by the responding party to take over from Peter Langer. There is no explanation why Jason McDonald was let go from Carriage Hill Homes. There is no explanation why the responding party made this other arrangement with P. A. Builders other than to intimidate Jason McDonald.

21. The applicant submits this is a case where certification pursuant to section 11 should be granted. In these circumstances there is a clear threat to the job security of Jason McDonald. The builder controls the work on site including the work of the subcontractors.

22. Based on the uncontradicted evidence before me, I find that Jason McDonald was employed by the responding party on the date of application. He was hired to replace Peter Langer. This contradicts the written submissions of the employer. As the employer chose not to participate I am left with the uncontradicted evidence of witnesses who were credible and forthright in giving their evidence. I am satisfied that based on the evidence before me the employer's conduct was designed to threaten Jason McDonald's job security. Jason McDonald was told he no longer worked for the responding party. This kind of intimidation is clearly in violation of the *Labour Relations Act, 1995*.

23. Section 72 of the Act provides as follows:

72. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

24. Section 96(5) provides:

96. (5) On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to the person's employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

25. The Board in *Maverick Mechanical Contractors Limited*, [1996] OLRB Rep. Mar./Apr.289 set out the requirements under which certification under section 11 is granted as follows:

- (1) the Act has been violated;
- (2) as a result of the violations of the Act, a representation vote does not or would not reflect the employees true wishes concerning the application for certification;
- (3) no remedy, including another vote, is likely to counter the effects of the violations of the Act in that respect;
- (4) the union has membership support adequate for the purposes of collective bargaining.

26. By terminating Jason McDonald's direct employment with the builder, prior to the vote without any apparent reason or explanation, one must conclude it was a signal to employees that their continued employment with the builder may well depend on the outcome of their vote. If the builder can tell his framing subcontractor to put someone on the payroll for his own purposes he can just as easily have an individual removed from that payroll. The first precondition has been met. The employer has violated section 72 of the Act by refusing to continue to employ Mr. McDonald because of his union activity.

27. The second and third preconditions relate to the taking of the vote. I am satisfied that the responding party's contravention of the *Labour Relations Act, 1995* destroyed the reliability of the ballot box as an indicator of the employees' true wishes. Jason McDonald was terminated from his employment with the builder because of his union activity. Jason McDonald was now working for a subcontractor to his former employer. Jason McDonald's job security is still at risk since the responding party controls the work of its subcontractors. The responding party is able to put persons on P. A. Builders' payroll for its own purposes. The responding party has shown its disregard for the Board's process by choosing not to attend the hearing and participate. In the circumstances, I am satisfied there is no other remedy that would make another vote any more reliable an indicator of the true wishes of the employees. Therefore the ballot box is to remain sealed. Preconditions two and three have been satisfied.

28. Based on the evidence filed I find the applicant has adequate membership support for collective bargaining.

29. All four preconditions having been met, the applicant is entitled to certification under section 11(1). The Board therefore:

- (a) declares the responding party has violated the *Labour Relations Act, 1995* and specifically section 72 by terminating Jason McDonald's employment because of his union activity;
- (b) directs that pursuant to section 160(1) of the *Labour Relations Act, 1995* a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of Ventara Construction Ltd. c.o.b.

as Carriage Hill Homes in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman;

- (c) directs the Registrar to destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period;
 - (d) the responding party is directed to post copies of this decision immediately, adjacent to the "Notice to Employees of Application and of Vote" posted previously. These copies must remain posted for a period of 30 days.
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4135-97-JD International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Applicant v. Labourers' International Union of North America, Local 1089 and **Chemfab Mechanical Contractors**, Responding Parties

Construction Industry - Jurisdictional Dispute - Labourers' union and Boilermakers' union disputing assignment of certain work related to removal of convection oil heater at petrochemical plant in Sarnia - Board finding that disputed work properly assigned to Boilermakers' union

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. Knight* and *G. McMenemy*.

APPEARANCES: *David McKee*, *Jim Tinney* and *Dale Quinn* for the applicant; *S.B.D. Wahl* and *R. Leone* for Labourers' International Union of North America, Local 1089; *Greg Bond* and *Fraser Maitland* for Chemfab Mechanical Contractors.

DECISION OF THE BOARD; April 20, 1998

I. Introduction

1. This is an application concerning a work assignment filed with the Board pursuant to section 99 of the *Labour Relations Act, 1995* (hereinafter "the Act"). A consultation in this proceeding was held by the Board on March 18, 1998.

2. The applicant (hereinafter "the Boilermakers") and the responding party Labourers' International Union of North America, Local 1089 (hereinafter "the Labourers") filed briefs with the Board prior to the outset of the consultation. The responding party Chemfab Mechanical Contractors (hereinafter "the employer" or "Chemfab") did not file any materials with the Board, but did attend at the consultation. The Board advised the representatives of the employer that they were entitled to make any submissions they desired based on the materials filed with the Board, but that the Board would not consider any factual allegations not already raised in the briefs previously filed.

3. The pleadings and briefs filed by the Boilermakers and the Labourers' raised a number of issues. The Board very carefully reviewed the briefs prior to the oral consultation, and determined that a number of the factors relevant to the disposition of a work assignment dispute were neutral, and therefore that it was unnecessary to obtain the oral submissions of counsel on those factors. As well, it appeared to the Board that a number of the issues raised - primarily by the Labourers' - were extraneous to the merits of the application. Accordingly, at the outset of the consultation, the Board advised the parties of the matters upon which we desired to hear oral submissions.

4. To amplify on the above, we advised the parties, at the outset, that the written materials before the Board disclosed that the constitutions and the collective agreements of the parties clearly gave each of the trade unions a jurisdictional claim to the work in dispute. As well, we advised the parties that it was unnecessary to make reference to prior IJDB decisions filed by the Labourers', or certain practice materials filed by the Boilermakers, as all of those materials were of no assistance to the Board.

5. Furthermore, we advised the parties that we did not require any submissions on the proposition made by the Labourers' that the Board ought to make an "area-wide" order binding all contractors in Board Area 2 to the resolution of this proceeding. At numerous times in its brief, the Labourers' asserted that it was both necessary and appropriate for the Board to make such an order, in the circumstances of this case. We are of the view that the Board has no authority to do so. It is plainly evident from the provisions of section 99 of the Act that the Board does not have the power to make such a wide-sweeping order. Certainly, the decision relied upon by counsel to support that proposition - *Comstock Canada*, [1993] OLRB Rep. Aug. 740 - does not authorize such an order. Even under the work assignment provisions of the previous Act such an order would have been incapable, and a breach of natural justice. In our view, to have entertained submissions on this point would have been a waste of the resources of the Board and of the parties.

6. Accordingly, the Board advised the parties that it desired to hear their submissions regarding the factors of area practice, trade agreements, employer practice, and skill, ability, and safety. In doing so, the Board directed certain questions to the parties. We have considered all of the submissions made by counsel.

II. Decision of the Board

7. The parties have described, in a different manner, the work in dispute. However, it was evident that the substance of the work in dispute was agreed upon by the parties. The work in dispute relates to the removal of a convection oil heater at the Nova Corunna plant in Sarnia, Ontario. The Labourers' description of the work was not disputed by the Boilermakers. That description of the work includes initial site set up; blanking off of the heater section; welding of lifting lugs to the section; cutting the section free from the production system; rigging of the section for lowering; direction and signaling of the hoisting equipment; receiving the heater section at ground elevation; transporting the heater to a lay down area; cutting the heater section into pieces for disposal as scrap; spraying and decontamination of the material; removal of all cut heater pieces for scrap; and the cleaning and clearing of debris.

8. It would also appear that there is no dispute that the employer assigned all of the work in dispute to members of the Boilermakers, save and except for the spraying and decontamination of the scrap material, the removal of the cut heater pieces for scrap, and the cleaning and clearing of debris. The Labourers' claim the other work for its members.

9. At the outset, the Board raised with counsel for the Labourers' the proposition that a vast majority of the area practice relied upon by the Labourers' appeared to be practice of contractors bound

only to the Labourers' Provincial ICI agreement. Although there was some doubt initially, it became quite clear that, in fact, the area practice relied upon by the Labourers' is of that very nature. Counsel for the Labourers' submitted that area practice of that nature was pertinent and that the Board ought to consider it for the purposes of this proceeding.

10. We disagree. The work in dispute in this proceeding was located in Board Area 2. Accordingly, the practice of contractors in Board Area 2 is an important factor to consider in determining this proceeding. We cannot, however, see any purpose in considering the practice of single trade contractors - in particular, demolition contractors bound only to a collective agreement with the Labourers'. In circumstances such as those, one would not be particularly surprised to discover that such a contractor would assign work such as the work in dispute to members of the trade union to which it is bound, rather than to members of the Boilermakers. The assertion that four large demolition contractors in Board Area 2 utilize members of the Labourers' to do similar demolition work is meaningless for the purposes of a work assignment dispute unless the assignment is made in circumstances where the Labourers' are chosen to perform the work over the Boilermakers. None of the evidence proffered by the Labourers' was of this character, and accordingly we consider it to have no probative value.

11. Much of the argument of the parties focused on the nature and extent of two settlement agreements which were the result of previous jurisdictional dispute applications at the Board. There was no dispute that these documents are agreements which bind the Labourers' and the Boilermakers, and that they apply to work performed in Board Area 2. Furthermore, the Boilermakers state that they desire to abide by the terms of the documents. The real issue, though, was the applicability of the documents to the circumstances before us.

12. The first settlement document arose out of a Board proceeding involving Foster Wheeler Limited (Board File 0929-88-JD). The second settlement document put before the Board reflects the resolution of another work assignment dispute involving Lam Sar Mechanical Contractors Limited (Board File 0353-91-JD). Both settlements were signed on June 2, 1992. The pertinent portion of the Foster Wheeler settlement reads as follows:

In the County of Lambton, OLRB Geographic Area 2, in circumstances where the contractor is performing demolition or dismantling of field-erected generating boiler(s) for industrial application for scrap within an operating environment and the contractor is bound by collective agreements with both the trade union parties hereto:

- (a) demolition or dismantling of particular boiler component(s) normally originally erected by Boilermakers shall be performed by members of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128;
- (b) all ground rigging at and from the point of first drop on the ground for all loads, the handling, cutting and disposal of all boiler components shall be performed by members of the Labourers' International Union of North America, Local 1089;
- (c) demolition or dismantling of particular boiler component(s) not normally originally erected by Boilermakers shall not be claimed by Boilermakers, Lodge 128 as against Labourers, Local 1089.

The Lam Sar settlement reads as follows:

In the County of Lambton, OLRB Geographic Area 2, in circumstances where the contractor is performing demolition or dismantling of tanks (and vessels and/or heaters directly ancillary to the tanks in question), for scrap (including such work in connection with replacement but not in

connection with repair, partial replacement or revamping of existing equipment) and the contractor is bound by agreements with both Union parties hereto:

- (a) all demolition and dismantling work shall be assigned to and performed by a composite crew consisting of equal numbers of members of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 ... and Labourers International Union of North America, Local 1089 ... performing all work functions interchangeably.

13. Without going into the same degree of detail that counsel did during the course of argument, counsel for the Labourers' asserted that the Foster Wheeler settlement applied to the circumstances before the Board, and that the work ought to have been assigned in the manner described in that settlement. In particular, counsel asserted that the work in dispute was performed within an "operating environment", and that the terms of the settlement mirrored the work in dispute. If the Board were of the view that the work in question was not performed in an "operating environment", then counsel's alternative position was that the Lam Sar settlement applied and that the distribution of work reflected by that document ought to have been effected by the employer.

14. There appears to be no question that the work in dispute was performed during a plant shutdown. However, there is also no question that when the work was being performed there were live electrical cables and pressurized gas lines in the working area. In this context, we are quite confident that it can be said that the work in dispute was performed in an "operating environment". Although the plant itself was not operating, electrical power and gas service was maintained in the area, and the same degree of care would have to have been observed by the tradespersons as if the plant were operating. Accordingly, we conclude that the work in dispute was performed in an "operating environment".

15. In that context, the Labourers' assert that the Foster Wheeler settlement agreement applies in the circumstances. Counsel for the Labourers' acknowledged that the purpose of the heater at Chemfab was not for use as a power boiler (i.e. to generate steam power). However, he asserted that the type of construction was the same. He argued that the heater in question was composed of tube walls which were subjected to heat by way of a firebox or duct, and this reflected only a difference in application of the same type of construction. That is, that in both cases the infrastructure is used as a heat exchanger, and that the construction is the same.

16. Counsel for the Boilermakers disagreed with this proposition. He noted the precise language inserted into the settlement agreements, and observed that the oil convection heater in question was not a power boiler. In fact, counsel asserted that the heater in question is not akin to a boiler either. Counsel for the Boilermakers asserted that the heater looks like a "field-erected steam generating boiler", but isn't. Instead, it's an oil furnace, and there is no steam at all; rather, petroleum is heated by water contained in a bundle of tubes, and draws off heat through what was described as a "cracking process".

17. Having carefully reviewed the argument of counsel, and the materials before the Board, we are not satisfied that the Foster Wheeler settlement applies to the work in dispute. It is trite to observe that settlement agreements such as the Foster Wheeler settlement must be interpreted by way of the language utilized on the face of the document. It is also trite to observe that a party to an agreement that asserts that it applies to particular circumstances has the burden of establishing its applicability. Here, the settlement agreement speaks to the demolition or dismantling of "field-erected steam generating boiler(s) for industrial application". There can be no doubt that the oil convection heater dismantled and demolished in the proceeding before us is not caught by that description. In the absence of any evidence or materials which would lead us to conclude that the dismantling and demolition of the heater is governed by this settlement agreement, we are not satisfied that it is. Accordingly, we conclude that neither the Foster Wheeler nor the Lam Sar settlement agreements are trade agreements which govern the work in dispute.

18. Returning, then, to the factor of area practice touched upon earlier, there was very little cogent evidence of area practice filed with the Board. It would appear that employers in the Sarnia area are not inclined to assist these trade unions by providing them with information about their current practice. This has inhibited the parties' from filing up-to-date materials speaking to this factor.

19. However, the parties have filed some materials speaking to the practice of employers in the area. The Labourers' have adduced very little area practice of relevance. It appears that Kel-Gor Limited performed a contract to remove two heaters at Shell by utilizing a crew consisting only of Labourers'. The Boilermakers assert that Kel-Gor Limited erroneously relied upon the Board's decision in *Multidem Inc.*, [1994] OLRB Rep. Feb. 166 in making this assignment. The Labourers' claim that such an assertion is "utter foolishness". "Utter foolishness" or not, the assignment was made.

20. The area practice adduced by the Boilermakers consists of three letters of 10 years vintage (one each from Great Lakes Fabricating, Lam Sar Mechanical Contractors Ltd., and Kel-Gor Limited). We do not give these letters great weight, having regard to their age. We do note, though, that the letter from Kel-Gor Limited does muddy the waters somewhat regarding the practice of that company, given the assignment of work noted above in paragraph 19.

21. To muddy the waters further, the Boilermakers filed evidence of employer practice which, in fact, turned out to be practice of Kel-Gor Limited. Mr. Greg Bond, an employee of the responding party employer before us, filled out an employer practice sheet filed by the Boilermakers, and indicated in it that in 1988 Chemfab had performed the removal of all or a section of a heater or furnace for Esso Chemicals using members of the Boilermakers. At the consultation, counsel for the Boilermakers advised the Board that Mr. Bond had now realized that that specific project had, in fact, been performed by Kel-Gor Limited, for which he worked in 1988.

22. In the circumstances, therefore, we ascribe little weight to the Kel-Gor Limited assignment of work to the Labourers' at the Shell project in 1994. It is not at all clear to us that the assignment was a recognition of the Labourers' "core jurisdiction", as was asserted by counsel in argument.

23. Of some significance is a project that was performed by Bluewater Fabricators & Erectors Inc. in 1995. The materials before the Board suggests that this contractor has used, exclusively, Boilermakers and Ironworkers to remove mechanical systems as part of a replacement contract. In 1995, Boilermakers were assigned the work of removing three tanks from a Bayer Chemicals plant in Sarnia. The Labourers' filed a grievance at the time but did not pursue the matter.

24. The Labourers' assert that this project was "a totally insignificant project", and that the tanks were not scrapped but were, in fact, retained for reuse. It was submitted that in those circumstances, the Labourers' made an assessment regarding the utility of filing a jurisdictional dispute and chose the more prudent route of not pursuing that application.

25. We do not quite agree with these assertions. The material filed by the Boilermakers from Bluewater Fabricators & Erectors Inc. includes a letter from the Owner and Manager which indicates that the "demolition" of the tank and all of the piperack was awarded to a composite crew of Ironworkers and Boilermakers. It is also stated that the tanks were transported to a scrap yard on Plank Road in Sarnia. As well, an attached "Job Order Form" of the Boilermakers respecting this job states on its face that the job includes "tank demolition". Accordingly, it would appear that the tanks were scrapped, contrary to the assertions of the Labourers'.

26. "Totally insignificant" or not, the fact is that members of the Boilermakers were utilized to perform the work in question, the work in question included the demolition for scrap of the three tanks, the Labourers' grieved the assignment of that work, and it chose to abandon the grievance and to not

bring a work assignment application respecting the work. In those circumstances, we can only conclude that the Bluewater Fabricators job is evidence of area practice in favour of the Boilermakers.

27. Considering all of the above, we are satisfied that the practice of other contractors in Board Area 2 leans toward the assignment of the work in dispute to members of the Boilermakers.

28. Turning to the factor of employer practice, again there is little evidence of employer practice before the Board. Chemfab has identified one previous project, at the Nova Corunna plant, in which a furnace was completely dismantled. This project occurred in 1991, and the employer utilized Boilermakers to perform the work.

29. In its written brief of submissions, and as amplified during the course of oral submissions, the Labourers' assert that there really isn't any cogent evidence before the Board that this work occurred. Counsel for the Labourers' stated that Chemfab did not employ any members of the Labourers' at that time and therefore that the Labourers' did not know of the performance of the work, until it received the Boilermakers' brief in this proceeding. As the employer had not filed anything to suggest that this work had in fact occurred, the Board ought to conclude that Chemfab has not engaged in this work at all in the 1990's. In particular, counsel noted that in the previous litigation involving Foster Wheeler and Lam Sar, the practice of Chemfab had not been noted.

30. In the circumstances, we do not agree with this submission. There is no question that Chemfab has put forward, in the form of an employer practice sheet provided to the Boilermakers, the proposition that it performed a furnace dismantling for Nova Corunna in 1991, and utilized members of the Boilermakers to perform that work. If that was in fact so, it would not be surprising that the Labourers' may not have been aware of the project. And it may not be all that surprising that the project was not mentioned in either of the Foster Wheeler or Lam Sar litigation, given the time frame of the litigation - Chemfab may have performed the work after the filings made in the Lam Sar litigation (which commenced in 1991), explaining the absence of reference to that project in the litigation. We are not satisfied that the project did not occur as indicated by Chemfab and the Boilermakers, and in our view the project is evidence of employer practice, albeit a limited one.

31. Finally, we consider the factor of skill and ability to perform the work. We are of the view that this factor falls in favour of the Boilermakers. Although it is fair to say that members of the Labourers' may well be capable of performing the raw tasks done by the Boilermakers on this project, it cannot be overlooked that this work was performed in an "operating environment". The two settlement agreements relied upon by the Labourers' appear to distinguish between an "operating environment", where members of the Boilermakers perform the more safety-sensitive work, and a "non-operating environment", where members of both trades perform all of the work. This, in our view, makes eminent sense. If all that is occurring is the total demolition of a furnace, for scrap, in a non-operating environment, there are no broader safety concerns inherent in the performance of the tasks. In an "operating environment", with certain utilities operative, the situation is different. Some special skill and/or ability is surely necessary to ensure that no significant industrial accident occurs. In our view, that concern favours an assignment of the work to the Boilermakers.

32. In the circumstances, then, the factors we consider to be relevant to the assignment of this work are either neutral, or favour assignment of the work in dispute to the Boilermakers. Accordingly, we are of the view that the work in dispute which was assigned to the members of the Boilermakers was properly assigned to members of that union, and therefore we uphold the assignment made by the employer.

CONCURRING OPINION OF BOARD MEMBER G. McMENEMY; April 20, 1998

1. Although I agree with the analysis and the decision in this case, I would like to make a few comments on trade agreements or jurisdictional agreements.
 2. Coming from the craft unions, I am familiar with these agreements and what is the intent of each of them.
 3. There are three trade agreements that govern some of the aspects of the overlapping jurisdictions of my own trade. The first agreement in 1957 outlines what work is captured and how it will be assigned. The second agreement in 1961 supercedes the 1957 agreement and is a further clarification and updates the assignments of work as of that date.
 4. What this example is meant to illustrate is that trade agreements build on the past and as the work changes so do the claims for the work assignment.
 5. While portions of some trade agreements that date to the early 1900's are still applicable today, some parts are not because of technology changes. With trade agreements like of that age it is up to the parties to argue that what is referred to in the old trade agreement is similar to the work in dispute, or that the new technology is a growth from the old.
 6. Both of the June 2, 1992 trade agreements deal with two separate working environments and with specific types of work. Each agreement stands on its own and does not further clarify or build on the established trade practice of each trade union. Also these two trade agreements are not of the age noted in paragraph 5 above and therefore it can not be argued that technology has changed in the last six years.
 7. While it is likely that a more comprehensive trade agreement was envisioned by Local 1089 when the trade agreements were signed, the wording of each agreement does not support a conclusion other than that reached in this case.
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4685-97-R Christopher Wittig, Applicant v. The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario representing the following affiliated Local Unions 105, 115, 120, 303, 353, 402, 530, 586, 773, 804, 894, 1687, 1739, Responding Parties v. **Christopher Wittig Holdings Ltd.**, Intervenor

Construction Industry - Termination - Application to terminate bargaining rights brought by individual who is both corporate employer's sole employee and its "directing mind" - Board dismissing application under section 63(16) of the Act as having been initiated by the employer

BEFORE: *Jules B. Bloch*, Vice-Chair.

DECISION OF THE BOARD; April 20, 1998

1. The applicant has applied to the Board under section 63 of the *Labour Relations Act, 1995* for a declaration that the responding parties no longer represent the employees in a bargaining unit for which it is the bargaining agent.

2. On April 13, 1998 a differently constituted panel of the Board issued a decision directing the applicant to file submissions why the Board should not dismiss the application as a consequence of the application being an employer initiated application.
 3. In total the submissions assert that Christopher Wittig Holdings Ltd. ("employer corporation") entered into a voluntary recognition agreement with the responding parties ("the union") on August 23, 1984.
 4. All the electric work on behalf of Christopher Wittig Holdings Ltd. is carried on by Christopher Wittig in his capacity as an employee and a member in good standing of the I.B.E.W.
 5. The applicant asserts that Mr. Wittig is not receiving any benefit by virtue of the voluntary recognition agreement. As well he asserts that he does not carry out any managerial management functions because there are no electrical employees to manage.
 6. The applicant submits that the policy raises *Section 63(16)* of the *Labour Relations Act, 1995* has no relevance in relation to the facts pertaining to this application because the applicant is the only employee.
 7. Section 63 of the Act envisages that applications for declaration terminating bargaining rights will be determined by way of representation vote. However, section 63(16) of the Act provides that in certain circumstances the disposition of a termination application will not be by way of a representation vote. Subsection 63(16) states the following:

63.(16) Despite subsections (5) and (14), the Board may dismiss the application if the Board is satisfied that the employer or a person acting on behalf of the employer initiated the application or engaged in threats, coercion or intimidation in connection with the application.
 8. It appears to the Board that Mr. Wittig is both the sole employee and the directing mind of Christopher Wittig Holdings Ltd. In the submissions filed with the Board there is no assertion that any other person is an employer, director or shareholder of Christopher Wittig Holdings Ltd. That being said and on the basis of the wording in section 63(16) I cannot see any reason why this matter should go to a vote.
 9. It is clear on the face of the submissions that Christopher Wittig applied for termination of bargaining rights. It is also clear on the submissions that Christopher Wittig is the sole directing mind of Christopher Wittig Holdings Ltd. and consequently has initiated the application to terminate bargaining rights; something that an employer cannot do.
 10. On the basis of the above reasons, I am dismissing this application.
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3103-97-U Ontario Nurses' Association, Applicant v. Comcare (Canada) Limited, Responding Party

Duty to Bargain in Good Faith - Intimidation and Coercion - Strike - Unfair Labour Practice - Union alleging that employer committing various unfair labour practices in its response to lawful strike - Board dismissing allegation that various communications by employer to striking employees amounting to unlawful intimidation - Board finding that employer engaging in hard bargaining and not bargaining in bad faith - Board dismissing allegation that use of replacement workers offending prohibition on use of professional strike-breakers - Board also

dismissing allegation that failure of employer to agree to union's proposal to pay for and maintain benefits during strike unlawful - Application dismissed

BEFORE: *Robert Herman*, Alternate Chair.

APPEARANCES: *Jacek Janczur*, *Karen Leeder* and *Cynthia Melo* for the applicant; *Patrick Moran*, *Glenn Christie*, *Margaret McAlister* and *Norma Johnston* for the responding party.

DECISION OF THE BOARD; April 17, 1998

1. This is an application filed pursuant to the provisions of section 96 of the *Labour Relations Act, 1995*, in which the applicant, the Ontario Nurses' Association ("ONA") alleges that the responding party, Comcare (Canada) Limited ("Comcare") has breached sections 70, 72, 76, and 78 of the Act.
2. The events the subject of the instant application arise out of a lawful strike engaged in by members of the ONA bargaining unit working for Comcare in Kingston, Ontario and the application challenges certain actions of Comcare, some in response to the strike. The strike began on November 7, 1997. Hearings were held on December 11, 1997, January 8, 1998 and February 6, 1998. As of February 6th, the strike was still ongoing and because of this, the Board provided a short oral decision at the conclusion of the hearing. The Board now provides its decision in written form.
3. The application was filed on November 18, 1997, shortly after the strike began. In the application, ONA complains about a number of actions taken by the responding employer. First, on November 11, 1997, Comcare issued a letter to its striking employees to ascertain whether they were available for work, and whether they would be available for work. ONA asserts that contacting employees in this manner was calculated to intimidate them, with a view to coercing them into returning to work, and as such constituted breaches of section 70, 72, 76 and 78 of the Act.
4. Second, the same letter informs striking employees that the employer would be issuing Records of Employment to those striking employees who did not plan to be available in the near future. ONA notes that a Record of Employment is issued to enable the recipient to collect unemployment insurance benefits, but striking employees are ineligible for such benefits. Given this, submits ONA, the employer's purpose in informing striking employees that they were to be issued these Records of Employment was to lead them to believe that their employment would be terminated if they persisted in striking. ONA submits that Comcare intended to intimate and coerce employees into returning to work by this statement, in breach of sections 70, 72, 76 and 78 of the Act.
5. Third, the same letter informs striking employees that they will no longer be eligible for benefits, and itemizes every benefit that will no longer be available. ONA had previously offered to pay the premiums for these benefits, so that no employee otherwise eligible would lose benefit entitlement during the strike. ONA submits that the failure of the employer to accept the union's offer to pay the benefit premiums, and the statements in the letter notifying employees that their benefits were discontinued, were deliberate attempts by the employer to increase the hardship experienced by the striking employees, and as such, constituted breaches of sections 72 and 76 of the Act.
6. Fourth, around November 11, 1997, Comcare began utilizing personnel from other Comcare operations to work as replacement workers during the strike. These replacement workers were being paid up to 150 percent of the strikers' rates of pay, even though during negotiations Comcare had relied upon a lack of funds as a reason for its inability to agree to the wage proposals of the union. The purpose of paying the replacement workers at this level, asserts ONA, is to prolong the strike, and therefore these replacement workers fall within the definition of "professional strike breaker", set out

in section 78(2) of the Act, and as such, their utilization by the employer is in breach of section 78(1) of the Act.

7. ONA filed additional particulars and raised additional grounds by way of letter dated December 3, 1997. First, it asserted that employees who worked during the strike were being assigned hours in excess of the hours permitted by section 17 of the *Employment Standards Act*, and were not being paid as required under that Act, in breach of sections 17, 21 and 24 of that Act.

8. Second, the continued insistence of the employer that it has no funds to finance the Kingston operation was clearly false, in light of the payment levels for replacement worker wages and expenses, and was therefore a breach of section 17 of the *Labour Relations Act, 1995*.

9. One allegation was ultimately withdrawn. At the commencement of the third and final day of the hearing, February 6, 1998, ONA withdrew its allegations that there had been a breach of section 78 of the Act, and indicated it was withdrawing its allegations with respect to the “professional strike breaking” provisions.

10. Turning to the facts, some of the facts recited below were not dealt with by the parties through *viva voce* evidence, but were not really in dispute. These facts include small details, such as the size of the bargaining unit, and a description of the general chronology leading up to the events that form part of the instant dispute. The parties did not lead evidence with respect to these non-contentious background matters, in an effort to litigate expeditiously, both parties recognizing the urgency of the application.

11. There were two previous applications filed with the Board arising out of the bargaining of an unfair labour practice complaint and an application that the first agreement be settled by arbitration (Board File Nos. 2279-97-U, 2280-97-FC). In the decision that issued in those applications, dated October 17, 1997, the Board set out the following facts:

4. The facts were not really in dispute. ONA was certified to represent RN's (Registered Nurses) and RPN's (Registered Practical Nurses) at Comcare on November 27, 1996. Notice to bargain was given by ONA, December 17, 1996. Though there was a communication problem concerning the commencement of bargaining (and the Board finds nothing turns on this communication problem in relation to this application) there were at least nine negotiation meetings, the last being a mediation meeting held on September 11, 1997. These meetings were held (March 19, 1997, April 2 and 3, 1997, April 29, 1997, June 17 and 18, 1997, June 21, 1997, August 12, 1997 and September 11, 1997).

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7. Comcare as stated in the filed material, is a provider of community based health care services. The services take two forms. Visiting nursing consists of isolated visits to a client's home - the evidence led showed that usually such visits take less than an hour. Shift nursing consists of a fixed time period during which a nurse remains present in a client's home to provide nursing care that is necessary and can last for four hours or more. Shift nursing also occurs in penitentiaries under a separate contract with the federal government. The primary method through which Comcare obtains patient - clients is by way of referral from the Community Care Access Centre (“CCAC”) on a contractual basis.

12. Comcare provides services on a “for profit” basis. The relationship between a CCAC and Comcare is a contractual one, and the CCAC refers clients who are in need of community-based nursing services to Comcare, where Comcare has been the successful bidder on the particular community care contract. These services are publicly funded. There may also be up to perhaps five percent of referrals which are contracted from Comcare on an individual basis.

13. The contracts with the Kingston Community Care Access Centre, which fund the services provided by Comcare through the nurses in the bargaining unit, are tendered at regular intervals. There is no guarantee that Comcare will be the successful bidder on any of those contracts. Indeed, the Board was advised that Comcare had recently failed to obtain a 1998 contract with the Kingston CCAC.

14. There appear to be four major issues in bargaining which have been the primary obstacles in negotiations: the way in which work shifts are scheduled, holiday pay, vacation pay, and sick leave pay.

15. The detail of the parties' negotiating positions was not the focus of this application, although the bargaining history did form part of the backdrop. Their differences with respect to scheduling merits some brief comment, at least because it helps explain their present stalemate. The parties have different understandings of the scheduling system that was actually in place and operating when the strike began, even though the scheduling system has been the same for at least ten years. Despite eight or nine negotiation sessions, and despite the several months during which the strike has been continuing, the parties still maintain different views as to how nurses are scheduled to work, and whether they determine their own availability, or whether the employer schedules them.

16. Comcare maintains it operates an "elect to work" scheduling system, whereby Comcare provides a timetable of the work that is available for the next scheduling period (usually a week or two in advance). The nurses can then accept or reject particular work opportunities, consistent with their own needs and wishes. According to Comcare, where a nurse declines to accept a particular shift or offer of a shift, because of that nurse's unavailability, there are no negative consequences of his or her decision not to work a particular shift or shifts, or not to accept a particular visit, other than the obvious consequence that the nurse will not be working the shift which the nurse declined. Nurses are not, therefore, assigned to particular shifts or patient-clients, but are offered shifts or patient-clients, to be accepted or rejected by the nurse without restriction or penalty. Even regular decisions not to work, asserted Comcare in evidence, will not reflect upon future offers of work to those nurses.

17. ONA disputes this characterization of the scheduling system for bargaining unit nurses. It asserts that a work schedule is posted, and nurses are required to report to work in accordance with that schedule. Some nurses prefer to work full-time hours and are scheduled in accordance with that desire, while others prefer to work on a part-time basis, and are similarly scheduled accordingly. If a nurse does not want to work a specific time slot or shift, as a general rule he or she is to advise Comcare before the schedule is posted. Occasionally a nurse advises of his or her unavailability after the schedule is posted, but this is not as common. Nurses are not free, in ONA's view, to accept or reject particular shifts or assignments.

18. It is unnecessary to resolve this factual dispute, although the evidence suggests that if nurses continue to decline shifts or assignments, they may find that they are not scheduled as often in the future. In any event, the four listed items continue to separate the parties.

19. ONA filed with the Board, on September 18, 1997, an application that the first contract be settled by arbitration. As noted, the Board issued a decision on October 17, 1997 dismissing that application. Though otherwise in a legal strike or lock-out position, the parties had agreed that there would be no strike or lock-out pending the issuance of that decision. Therefore, subsequent to October 17, 1997, ONA was in a legal strike position.

20. As the bargaining unit was newly organized, ONA made sure that the nurses in the bargaining unit were aware of their rights. ONA told the nurses that they were legally entitled to strike and could not be fired for doing so. Nurses were also advised that they would not be entitled to collect

unemployment insurance benefits while on strike, and that Comcare would be able to use replacement employees to perform their work during the strike.

21. ONA realized that a strike would result in the cessation of benefits for its members, and wanted to protect them. It contacted Comcare and asked to be allowed to pay the cost of the benefits premiums itself, so that benefits would remain available to the nurses, but at no cost to the employer. Comcare refused, thus ensuring that benefits coverage would terminate with the commencement of the strike (for any nurse on strike). Comcare's refusal was in large part motivated by a desire to exert economic pressure against the striking nurses, so that those on strike would receive neither wages nor benefits.

22. Both parties knew that a strike was imminent, and likely to begin around the end of the first week of November. Any strike would obviously have scheduling implications for both Comcare and the nurses. Generally speaking, nurses submit weekly time logs, by Thursday or Friday morning each week, showing their availability for the upcoming week, which begins on Saturday. Comcare then tries to match particular nurses' availability with particular patient-clients or shifts.

23. The time logs for the week beginning Saturday, November 8, 1997, were to have been received by Comcare on Thursday, November 6, 1997, or at the latest, by the next morning. Some of those received on November 6th indicated that the nurse would not be available for work, should ONA begin a strike. Other logs indicated that the nurse would be available. Not all the time logs made reference to an impending strike.

24. Around 11:57 p.m. on Thursday, November 6, 1997, Comcare officials received a phone call from union officials advising that the strike would begin the next day and that nurses would not be showing up for their shifts or assignments.

25. Since many of the individual logs for the following week had been filed prior to the commencement of the strike, and since not all the logs made clear whether the nurse would work if a strike was called, Comcare was not confident that the logs provided it with an accurate picture of which nurses would be withdrawing services. Accordingly, beginning on Friday, November 7, 1997, Comcare phoned individual nurses to check into their availability, and to ask them whether they would be showing up for scheduled shifts and whether they ought to be scheduled for shifts during the duration of the strike. These phone calls took place over the next several days. Some nurses were not in when initially called, and messages were left asking them to phone Comcare. Patient-clients were also contacted directly by Comcare, both to arrange visits for them and to confirm that nurses had been showing up as scheduled.

26. Approximately fifty of the nurses in the bargaining unit continued working during the early days of the strike. Comcare arranged for replacement workers for the nurses who were striking, either by increasing the shifts of nurses in the bargaining unit who were still working, or by assigning the patient-clients or shifts to non-bargaining unit Comcare nurses working in the Kingston area, or other Comcare nurses based outside Kingston, who were relocated for this purpose to the Kingston area.

27. Comcare absorbed any costs that replacement workers would have incurred, such as expenses for travel and relocation, or temporary housing in the Kingston area. As well, all replacement nurses were paid at the same rate that would have been paid to the striking nurses, or the rate at which the replacement nurses were customarily paid, whichever was higher. Thus, a Comcare nurse from outside Kingston, who was ordinarily paid a higher wage than the bargaining unit nurses, ordinarily received all expenses of relocation to the Kingston area, including temporary lodging and expenses, and continued to be paid at his or her customary wage rate.

28. It was costing Comcare more to pay these expenses and (in some cases) higher wage rates than it would have cost Comcare to pay the rates sought by the union in bargaining. There is no evidence that Comcare's scheduling of nurses or payment of them breached any provision of the *Employment Standards Act*.

29. The strike continued. The majority of the nurses remained off work and on strike. The combination of replacement workers and nurses in the bargaining unit who continued to work enabled Comcare to service the needs of its patient-clients.

30. On November 11, 1997, four days after the strike began, Comcare sent a letter to all of the nurses in the bargaining unit and to ONA. Many of the letters were delivered by courier or in person. The letter began by noting Comcare's obligation to continue serving its clients, despite the strike, and indicated that Comcare had contacted each of the nurses "to determine [their] availability to accept or continue assignments [in order to] ensure continuity of care". Comcare wrote that it would "be issuing Records of Employment to those of you who have chosen not to work since Friday, November 7, 1997 and who do not plan to be available in the immediate future." The letter advised employees that "the benefit package enjoyed by eligible nurses will no longer be available to those nurses not working after Friday, November 7, 1997." The letter itemized every benefit otherwise available in the benefit package. Finally, the letter noted that it had come to Comcare's attention that nurses had been contacting clients in an effort to involve them in the labour dispute. Comcare stated that such conduct was inappropriate and unacceptable and that clients were being instructed to contact the College of Nurses of Ontario and the CCAC with any concerns they might have regarding the conduct of nurses. Comcare advised its nurses "to refrain from calling clients for any reason other than to schedule visits for the assignment you have accepted as required through the course of your employment." It is this letter that ONA asserts breaches the Act in a number of different respects.

31. Comcare issued this letter for several purposes. It wanted to advise employees of what it was doing in contacting them, and wanted to emphasize to them the consequences of being on strike. The termination of their benefits was one such consequence. While part of the reason for detailing the benefits to be lost was to make employees fully aware of which benefits would no longer be available, so they could govern themselves accordingly, a meaningful part of the motivation for this aspect of the letter was the desire to directly convey to employees the economic consequences of their actions.

32. The reaction of some of the nurses in the bargaining unit was hardly surprising. Some felt threatened, because they interpreted this letter as somehow suggesting they could lose their jobs or be fired because they were striking. Some nurses assumed that the reference to a Record of Employment being issued was indicative of this risk. Others felt threatened or concerned because of the reference to reporting to the College of Nurses, raising for them the spectre of disciplinary proceedings because of their participation in the strike. However, even where some nurses initially responded to the letter in this fashion, by the next day, or the day after at the latest, ONA again reassured the nurses in the bargaining unit that they could not be fired for engaging in the lawful strike. ONA told the nurses that the issuance of a Record of Employment did not mean that they were fired.

33. Both because of these reassurances from ONA and these repeated explanations as to their rights, and because of ONA's preparation of the nurses and communications to them prior to the commencement of the strike, it is quite unlikely that nurses were truly concerned that they might be fired for striking, and if some were, their worries would have lasted only a day or so after receiving Comcare's letter.

34. Pursuant to Regulations issued under the *Employment Insurance Act*, an employer is required to forward a Record of Employment, on a form supplied by the Employment Commission, to an employee who has an interruption of earnings, and is required to do so not later than five days after the

commencement of the first day of the interruption of earnings. An employer is to note on the form the reason for issuing the Record of Employment. Approximately two weeks after the strike began, Records of Employment were forwarded to those nurses who had not been working during the strike. Preprinted on the back of each Record of Employment is a listing of the code letters employers are to utilize in providing the reason for issuance. The code for "strike or lock-out" is noted as "B". Comcare used code letter "K" as the reason for issuing the Record of Employment. "K" is the code for "OTHER SEE COMMENTS SECTION". Along with noting "K" as the reason for issuing the Record of Employment, in the "COMMENTS" section of the individual Records of Employment, the employer wrote "strike".

35. No nurse in the bargaining unit who was on strike prior to November 11, 1997 returned to work either as a result of Comcare's letter of November 11, 1997 or as a result of the subsequent issuance of a Record of Employment to that nurse.

36. The strike continued through November and December. By December 26, 1997, there were no longer any replacement employees who were Comcare employees relocated to Kingston for the strike. All bargaining unit work was being performed by nurses in the bargaining unit and by other nurses who had worked for Comcare in the Kingston area.

37. Little meaningful bargaining has taken place since the filing of the initial first contract application. No bargaining took place between approximately November 11, 1997, shortly after the commencement of the strike, until late January, 1998. In late January, while the instant matter was being litigated, the parties did meet, but no progress was achieved.

38. Finally, during final submissions and for the first time, ONA asserted that Comcare had been engaged in surface bargaining, and was therefore in breach of section 17 of the Act. As this assertion was not made earlier in the proceeding, and was objected to by Comcare, the Board ruled that it was too late for ONA to raise this allegation.

39. At the conclusion of the hearing, and after a recess, the Board provided the following decision orally (not all the comments made orally are repeated here):

Written reasons will follow, and will be more complete; however, in the Board's view, and no doubt in the parties', it is important that the parties have an answer quickly to this dispute, as there is an ongoing strike.

I will not repeat the allegations made by ONA, but I note that the Board here is only dealing with the case that was alleged at the beginning of the proceeding, and not additional matters that were alleged for the first time in final submissions.

Generally a strike can be disruptive, severely difficult, damaging to the parties and the individuals involved, and in many cases, irreparably so. A strike is economic warfare of a sort, and the Board ought not lightly to intrude into this arena. Both sides in a lawful strike are entitled to exert their relative and respective economic strengths.

With respect to the particular allegations, the phone calls made to individual nurses to inquire whether the nurses would be available for work or not, after the strike began, did not constitute breaches of the Act. There was nothing untoward or unlawful in Comcare's phoning of these nurses in the circumstances, and from a professional service perspective, it might indeed have been incumbent upon Comcare to have made these phone calls.

With respect to obtaining replacement employees in the manner that it did, and paying them as it did, the Board only has evidence with respect to these replacement employees working at the beginning stages of the strike. It was not an unfair labour practice for Comcare to pay certain replacement nurses, who were Comcare employees, the rates that those individuals received in their home bases, together with any additional expenses incurred because of working in the Kingston area.

With respect to the communiqué of November 11, 1997, the Board finds this the most troubling aspect of the case. I find that this letter was not issued only with a view to informing employees that Records of Employment would later issue if employees remained off work, and as a courtesy in order to list for employees their benefits and to advise them that their benefits would be lost. I find also that this letter was issued in order to bring home to employees the costs of engaging in and remaining on strike, and specifically, the loss of benefits that such actions would entail. With respect to the reference to the Records of Employment in this communiqué, that was at least in part made to bring home again to employees that a strike is a severing of employment, of sorts, and what that means for employees.

However, I do not find that the letter was intended to unlawfully intimidate or coerce employees into not exercising their rights under the Act, or to in any way seek to penalize them for doing so. Rather, the letter told employees graphically what some of the costs of the strike were or would be, and told them that Records of Employment would be issuing, which is as required by law. I do not find that the letter was inappropriately intimidating or coercive in motivation or content, even with its reference to reporting to the College of Nurses. In the overall context, issuing this letter was not an unfair labour practice, but rather can be more properly characterized as "playing hardball". The employer was entitled to do so, and to act as it did here.

The fact that some employees were intimidated is not unusual or surprising, given the contents and timing of the letter, and the fact that the letter might have made things more difficult for the union is also not surprising. Nevertheless, this letter, while close to the line, fell on the lawful side of that line.

With respect to the issuance of the Records of Employment itself, that is not an unfair labour practice. Indeed, the employer is required to do so pursuant to the Regulations under the applicable Act. I place no significance on the fact that "K" was marked off on the front of the Record of Employment, and the comment "strike" was placed in the "COMMENTS" section, rather than the letter "B" being check off.

With respect to the alleged breaches of the *Employment Standards Act* (assuming I have jurisdiction to decide this matter in an application filed solely under the *Labour Relations Act, 1995*, in which I am sitting as the Alternate Chair of the Ontario Labour Relations Board, and not as an Adjudicator or Referee under the *Employment Standards Act*), there is no evidence before the Board to substantiate any such breach.

With respect to any breach of section 17 of the Act and the allegations that the employer is engaged in surface bargaining, the allegation is based upon the position of the employer in bargaining on the monetary items, and how inconsistent that position is with its subsequent payment of replacement workers (i.e. paying them more than the wages of the striking nurses and more than it would cost to accede to ONA's position in bargaining).

Comcare had a rational business reason for obtaining replacement employees in the manner that it did and for paying them as it did. In light of this, on the evidence there is not a breach of section 17. Although the employer chose to spend extra money on the need to maintain services during a strike, it is not a breach of the Act for the employer to decline to offer to ONA in bargaining the same amounts of money. Again, the employer has taken a stance of hard bargaining in this respect, but has not committed an unfair labour practice.

In summary, this application will be dismissed.

However, in doing so, I note a concern. The parties are now three months into a lawful strike, and it appears that the parties may still have a different understanding of how scheduling actually worked at Comcare in Kingston prior to the commencement of the strike. This reflects a serious communication problem between the parties. I make no suggestion as to whose fault such a communication problem might be, as that has not been the focus of the issues before me, but it appears to remain a problem.

40. There is one additional comment relevant to the question of whether the refusal of the employer to allow ONA to pay for and maintain benefits was in breach of the Act. Bill 40, the Act in

effect just prior to the current Act (Bill 7), contained section 81.1, which required the employer to allow the union to pay for benefits during a strike. The current Act contains no such provision, and its removal suggests a legislative intention that an employer no longer be required to give its consent to such a union request, or to make arrangements to accommodate the change. Absent improper motivation, to conclude that the employer's refusal to accept ONA's offer to pay for benefits premiums was an unfair labour practice would be inconsistent with the statutory change eliminating the obligation to do so.

41. For these reasons, the application was dismissed.

2076-96-U Ontario Public Service Employees Union (OPSEU), Applicant v. The Crown in Right of Ontario as represented by Management Board of Cabinet, Responding Party v. Manpower Services (Ontario) Ltd., The Employment and Staffing Services Association of Canada (Essac), AIDA Canada Ltd., Armor Personnel Inc., Bradson Staffing Services, Drake International Inc., Ecco Staffing Services, Ian Martin Limited, Keith Bagg Staffing Resources Inc., Kelly Services (Canada), Ltd., Nursing & Homemakers Inc., Olsten Services Limited, Herzing Services Inc., Quantum Management Services Limited, T.E.S. Contract Services Inc., Tosi Placement Services Ltd., Y&R Personnel Services Inc., Interim Healthcare, Intervenors

Duty to Bargain in Good Faith - Evidence - Practice and Procedure - Unfair Labour Practice - OPSEU alleging that Management Board violated its duty to bargain in good faith when it failed to disclose its decision to privatize the "GO Temp" service during the previous round of collective bargaining - OPSEU seeking production of certain documents for purpose of cross-examination - Management Board objecting to production order on grounds of timeliness and Crown privilege - Timeliness objection dismissed - Board concluding that certain documents sought need not be produced on grounds of relevance and public interest immunity - Board concluding that other documents, including business plan, estimates and budget document not covered by public interest immunity - Management Board directed to deposit those documents with the Board for personal and confidential inspection by vice-chair - Those documents to be made available to OPSEU if vice-chair satisfied that they should be produced

BEFORE: *G. T. Surdykowski*, Vice-Chair.

APPEARANCES: *Gavin Leeb* for the applicant; *Dennis W. Brown, Q.C.* and *Liane Brossard* for the responding party; no one appearing for the intervenors on the motion.

DECISION OF THE BOARD; March 11, 1998

1. The responding employer, the Crown, objects to producing the documents identified in a Board summons served by the applicant trade union, OPSEU, in this proceeding.
2. This is a complaint under section 96 of the *Labour Relations Act, 1995* in which OPSEU alleges that the Crown has violated section 17 of the Act.
3. Once an appropriate notice to bargain is given, section 17 obliges the collective bargaining partners to bargain in good faith and make every reasonable effort to make a collective agreement. OPSEU alleges that the Crown has violated section 17 in the negotiations which led to the collective

agreement currently in effect between them. The following facts, taken (but not quoted exactly) from OPSEU's pleadings, are not in dispute:

1. The applicant and respondent are parties to a collective agreement that was reached March 29, 1996, following a 5 week strike.
2. Collective bargaining commenced in April, 1995.
3. The recognition clause of the collective agreement specifically provides for the inclusion of "GO Temps" in the bargaining unit.
4. GO Temp employees work on temporary assignment in the Province's ministries, agencies, boards and commissions. 'GO Temp' is the Government of Ontario temporary help service administered through the Management Board Secretariat.
5. Articles 3.38, 3.X and Appendix 16 of the collective agreement specifically apply to GO Temp employees.
6. This is the first collective agreement between the applicant and respondent to include GO Temps in the bargaining unit.
7. On 31 January, 1996, Ms. Michele Noble, Deputy Minister, Management Board Secretariat, informed Ministry employees regarding the existence of a Business Plan for the Ministry.
8. On April 11, 1996, Mr. David Johnson, Chairman, Management Board of Cabinet, released an Interim Report on Business Planning and Cost Savings Measures indicating that GO Temp services will be restructured.
9. On August 23, 1996, the Management Board secretariat issued a Request for Proposals to privatize the provision of temporary help services for the Province's ministries, agencies, boards and commissions.
10. Approximately 2,100 people were regularly employed as GO Temp employees on an ongoing basis.
11. Approximately 1,300 GO Temp employees were employed throughout the Government of Ontario each week.
12. At least eight (8) full-time OPSEU members worked for GO Temp Services on a permanent basis, providing GO Temp employees to ministries across the government.

4. In addition, OPSEU alleges that:

- (a) The Union devoted considerable effort, resources and time towards representing GO Temp employees' interest in bargaining with the respondent. The parties exchanged proposals regarding GO Temps during bargaining.
- (b) On April 12, 1996, employees of GO Temp services were advised by the Director of General Business Services, Ms Janis Clarke, that they would be losing their jobs as a result of Mr. Johnson's announcement regarding restructuring the day before.

- (c) In accordance with Appendix 16 of the collective agreement, OPSEU appointed members to a sub-committee to fulfil its obligation pursuant to Appendix 16.
- (d) The Respondent failed to advise the Applicant during bargaining that it was about to restructure and eliminate GO Temp Services.

5. In short, OPSEU alleges that the Crown violated section 17 by failing to disclose its decision to privatize the “GO Temp” service during bargaining.

6. The Crown denies OPSEU’s allegations, and that it has breached the Act in any way.

7. Although the proceeding has been delayed several times (as a result of circumstances which it is unnecessary to recount), the hearing is well underway. Indeed, OPSEU has closed its case-in-chief, and is set to begin its cross-examination of the Crown’s first witness, Peter Wallace (Director of Expenditure Management and Reporting for the Management Board Secretariat).

8. An issue has arisen concerning the production of documents which OPSEU requests the Crown be required to produce for the purpose of cross-examination. Although the specific device employed by OPSEU to obtain production which has given rise to this issue is a Board summons, what OPSEU seeks is a Board order (which of course the Board summons is) requiring the Crown to produce documents identified by OPSEU as follows:

- 1. All submissions prepared for and/or provided to the Management Board of Cabinet, including drafts and all supporting documents, in relation to the privatization and/or consideration of ‘alternate service delivery’ for GO-Temp Services, including but not limited to the Ministry’s Business Plan as it relates to GO-Temp Services.
- 2. The document(s) referred to as the “Business Plan, Estimates and the Budget” in J. Clarke’s e-mail to Linda Barber dated July 17, 1996. See attached. [copy of e-mail attached to this decision as Appendix “A”]
- 3. All documents, reports, memoranda or any other material that was either prepared for or reviewed in the preparation of the Interim Report on Business Planning and Cost Saving measures delivered April 11, 1996 by the Chair, Management Board of Cabinet, in relation to GO-Temp Services.

(taken verbatim from Schedule “A” to the summons served by OPSEU)

9. The Crown objects to the production order requested on the basis that the request is untimely, and also claims Crown privilege or immunity with respect to the documents themselves.

10. The Board heard the representations of the parties with respect to the issue at a hearing held on February 5, 1998.

11. Subsequently, by letter dated February 11, 1998, OPSEU seeks to make further representations regarding the Crown’s assertion that OPSEU’s production request is untimely. By letter dated February 17, 1998, the Crown objects to OPSEU’s written representations, on the basis that is an improper attempt to re-open or re-argue one of the issues which were before the Board on February 5, 1998. There was a further subsequent exchange of correspondence as well.

12. I am satisfied that the Crown’s objection to OPSEU’s post-hearing written representations must be sustained.

13. As counsel for the Crown points out, when the hearing on February 5, 1998 commenced he indicated that he had not advised OPSEU that the Crown was taking the position that the union’s

production request was untimely until that morning, and that if OPSEU's representative felt he needed time to prepare to deal with that part of the Crown's position he had no objection to that opportunity being afforded him. Although Mr. Leeb grumbled about the timeliness of the Crown's timeliness objection, he gave no indication that he required or wished to have an opportunity to prepare submissions in that respect. Instead, he dealt with that issue in his submissions. I note that while his post-hearing written submissions are somewhat more detailed, there is little of substance in them which was not addressed in its oral submissions at the hearing on February 5, 1998.

14. In the result, in dealing with the production issue the Board will not consider any representations made or materials filed subsequent to the February 5, 1998 hearing.

15. The Board is the master of its own procedure, both generally and specifically when it comes to the production of documents and other evidentiary matters. In that respect, subsections 111(1) and (2) of the Act provide, *inter alia*, that:

111.(1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

• • •

- (b) to require any party to produce documents or things that may be relevant to a matter before it and to do so before *or during* a hearing;
- (c) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce the documents and things that the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

• • •

- (e) to accept such oral or written evidence as it in its discretion considers proper, whether admissible in a court of law or not.

[emphasis added]

16. However, notwithstanding that the Board is not bound to follow any particular procedure in a hearing, and that it is not bound by the rules of evidence which apply in a Court proceeding, Board proceedings are not litigation free-for-alls. Parties to a Board proceeding are absolutely entitled to fairness and natural justice, and the Board applies these principles in its proceedings. To that end, the Board also applies the logic if not the letter of various exclusionary rules of evidence.

17. It is fundamental to the system of justice in this province, both generally and specifically before the Board, that all parties to a proceeding have a full and fair opportunity to make their case, or to answer the case asserted against them. In our adversarial system, this includes a broad right to test the evidence presented by another party by cross-examining its witnesses.

18. Although the right to cross-examine is a broad one, it is not unlimited. A party can only cross-examine on issues which are relevant to the matters in issue.

19. The Crown has chosen to make itself *qua* employer subject to substantially the same labour relations structure which other employers in this Province must operate within. Having said that, the Crown is not in exactly the same position as every other employer, and as a party, it is not in exactly the same position as every other party involved in a labour relations proceeding, whether before this

Board or elsewhere. One difference is highlighted in this case; namely, the Crown can claim an immunity with respect to the production of otherwise arguably relevant documents or information which other litigants cannot claim (except perhaps at the instance of the Crown).

20. In this case, there are two aspects of the Crown's timeliness objection to OPSEU's attempt to obtain production:

- (a) that OPSEU had and failed to pursue an earlier opportunity to acquire the information, and that it has sufficient information for its purposes in any event; and
- (b) in seeking production after it has closed its case, OPSEU is improperly attempting to split its case.

21. The first question is whether the documents in question are relevant. If they are not, they would need not be produced even if the Crown's objection regarding the timeliness of OPSEU's request, or its claim to immunity, were denied.

22. It is well-established that one of the purposes of the duty to bargain in good faith established by section 17 of the Act is to encourage the settlement of collective agreements through a rational and informed bargaining process which minimizes the need to resort to or continue with the economic sanctions of a strike or lock-out. Section 17 requires the parties to bargain in a frank and honest manner (see, *Inglis Ltd.*, [1977] OLRB Rep. Mar. 128, among others). Accordingly, misrepresentations designed to deceive or which result in the other collective bargaining partner adopting or accepting a position which is materially different from the position it could and would have taken if it had known the real facts, are prohibited by section 17 (see, for example, *Indalloy, Division of Indall Ltd.*, [1979] OLRB Rep. Jan. 35; *Old Oak Properties Inc.*, [1996] OLRB Rep. July/Aug. 648).

23. Section 17 therefore requires an employer to respond honestly if a union asks in bargaining about an employer's settled intentions regarding a matter which is likely to have a significant impact on the union or bargaining unit. An employer is only required to reveal decisions, including *de facto* decisions, which have actually been made, and not plans, ideas or proposals which are merely under consideration (*Westinghouse Canada Ltd.*, [1980] OLRB Rep. Apr. 577, application for judicial review dismissed, 80 CLLC ¶14,062 (Divisional Court); *Kennedy Lodge Nursing Home*, [1980] OLRB Rep. Oct. 1454; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411; *Plaza Fiberglass Manufacturing Ltd.*, [1990] OLRB Rep. Feb. 192; application for judicial review dismissed, [1993] OLRB Rep. Jan. 83 (Divisional Court)). Sometimes this raises the question of whether the employer's decision-making process is sufficiently far along that it should have been disclosed. In *Consolidated Bathurst Packaging Ltd.*, *supra*, the Board put it this way:

50. On the other hand, plans and decisions to close a plant can effectively extinguish a bargaining unit and the relevance of the usual terms of a collective agreement. In this context, where a decision to close is announced "on the heels" of the signing of a collective agreement, the time of such a significant event may raise a rebuttable presumption that the decision-making was sufficiently ripe during bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining. It can be persuasively argued that the more fundamental the decision on the workplace, the less likely this Board should be willing to accept fine distinctions in timing between "proposals" and "decisions" at face value and particularly when strong confirmatory evidence that the decision-making was not manipulated is lacking. This approach is sensitive to the positive incentive not to disclose now built into our system, and the potential for manipulation. Indeed, a strong argument can be made that the *de facto* decision doctrine should be expanded to include "highly probable decisions" or "effective recommendations" when so fundamental an issue as a plant closing is at stake. Having regard to the facts in each case, the failure to disclose such matters may also be tantamount to a misrepresentation. We might also point out that there are decisions

taken because of costs which really ought not to be made until the underlying problem is discussed with the union to see if adjustments can be made and the decision avoided. However, for the reasons discussed above, we are not willing to adopt the *Ozark Trailers* test of “thinking seriously” for unsolicited disclosures as urged upon us by the complainant. The failure to reveal such “possibilities” as a general matter is not tantamount to a misrepresentation and therefore lacks the bad faith rationale developed in *Westinghouse* justifying unsolicited disclosure. The purpose of such information would be investigative and to facilitate the rational discussion purposes of the bargaining duty. Accordingly, the purpose of the information and the difficulties detailed above with unsolicited disclosure militate against any substantial expansion of the unsolicited disclosure obligation as elaborated to date. The interests of employees are real but the Board is not ignoring these interests by requiring a questioning approach to disclosure as a general matter. The position urged upon us by the complainant has too much potential or “greater heat than light” at the bargaining table. There is already enough uncertainty over precisely how significant and what nature a decision must be to trigger the unsolicited disclosure duty. Unsolicited disclosure must be understood to be exceptional and centred essentially on a bad faith rationale.

24. Further, as the Board pointed out in *Union Carbide Canada Ltd.*, [1992] OLRB Rep. May 645, the fact that an employer’s negotiators were themselves unaware of a *de facto* decision is no defence, because the employer is obliged to send properly informed and instructed negotiators to the bargaining table.

25. In this case, in order for the Board to determine whether the Crown breached section 17 of the Act as alleged by OPSEU, the Board must be able to determine when the *de facto* or actual decision to eliminate its Go Temp service was made. When that decision was effectively (if not officially) made is fundamental to the Board’s considerations. Indeed, although OPSEU’s request and submissions were somewhat more expansive, that is really what the union is after.

26. Accordingly, it is apparent that at least some of the documents which OPSEU seeks to have the Crown produce are at least arguably relevant (the test employed by the Board) to the matters in issue. That is sufficient to require the Board to consider the Crown’s objections. I turn first to the Crown’s timeliness objection.

27. Could OPSEU have obtained or have sought to obtain the production it seeks earlier? Of course it could have. But the fact that a party has not pursued an earlier opportunity to obtain production, either within or outside of a particular proceeding, does not necessarily preclude it from seeking such production after a hearing has begun, or even after it has closed its case in chief. There must be good reason to circumscribe a party’s right to the production of otherwise relevant documentary or other evidence.

28. When it comes to arguably relevant evidence, the general principle to be applied is production rather than non-production; that is, every relevant fact should be made available to the parties and the tribunal unless there is a good reason not to (see, *R. v. Snider*, [1954] S.C. 479 (Supreme Court of Canada)).

29. Further, production is not the same as proof. The mere fact that a party is able to obtain production of apparently or arguably relevant documents before or during a hearing does not mean that it will also necessarily be able to prove them so that they actually become evidence before the Board. The mere fact that a document is produced, whether voluntarily or in response to a summons or other Board order, does not make it evidence. Unless it is entered into evidence on consent, every document must be properly proved before it can become evidence. Accordingly, a party which waits to try to prove part or all of its case in cross-examination of another party’s witness(es) risks disappointment.

30. The Act specifically contemplates the production of documents in the course of hearings before the Board, it is not unknown for a party to seek production during cross-examination, and it is

not obvious why the mere fact that OPSEU did not seek the production it now seeks earlier should operate to disentitle it from that production.

31. In that respect, I note that the earlier opportunity to which the Crown adverted was a consultation process in which the Crown engaged with a number of trade unions on the basis that the bargaining unit information revealed through the process would remain confidential and could not be disclosed or used elsewhere. Because of that condition, OPSEU declined to participate in the process. It is far from clear that OPSEU could have used any information it might have obtained through that process in this proceeding (although it is not clear that it couldn't have done so either, since it may be that events have overtaken the need for that particular confidentiality). In any event, that process is part of the background, but is not directly related to this proceeding. In addition, the Crown asserts no actual prejudice which cannot be remedied within this proceeding, other than the prejudice underlying its claim to immunity.

32. Further, while OPSEU may encounter difficulty if it seeks to prove or bolster its case in reply, any objection in that respect is premature. At the moment, OPSEU is not seeking to call reply evidence, or to enter into evidence a document which has not been proved. It is seeking to test the evidence of the Crown's first witness by cross-examining him with what it hopes will be the aid of the documents which it seeks to have the Crown be required to produce. Subject to the substantive part of the Crown's objection, OPSEU is entitled to try to do so with the aid of the Crown's own documents.

33. The Crown's timeliness objection to OPSEU's request is therefore dismissed.

34. Turning to the more substantive part of the Crown's objection, counsel filed the affidavit of Robber Christ, who identifies himself in the affidavit as an Assistant Deputy Minister of Policy Co-ordination of the Cabinet Office of the Government of Ontario, in support of its assertion of Crown immunity. OPSEU did not object to the affidavit. Nor did OPSEU seek to cross-examine the deponent. In his affidavit, Mr. Christ deposes as follows:

ONTARIO LABOUR RELATIONS BOARD

Ontario Public Service Employees Union (OPSEU) v. The Crown in Right of Ontario as represented by Management Board of Cabinet, et al.

[OLRB file 2076-96-U]

Affidavit of Robber Christ

I, Robber Christ, of the City of Toronto, make oath and say as follows:

1. I am Assistant Deputy Minister of Policy Co-ordination of the Cabinet Office of the Government of Ontario, and as such have knowledge of the matters herein deposed to.

2. I have read and considered carefully the documents referred to below, and have formed the opinion that their production would not be in the public interest for the reasons outlined below.

3. In my considered opinion, disclosure of the contents of these documents would prejudice and inhibit the functioning of Cabinet government with respect to the ability of Cabinet to act and of both Ministers of the Crown and the public service to advise. It is essential for the proper working of government that Ministers and the public service not be hampered in their ability to give complete and honest advice on matters before Cabinet without concern that that advice, or parts of it, may be disclosed.

4. Generally speaking, Cabinet submissions set out the background and context of the issue under consideration, various options for addressing it, with the advantages and disadvantages of each, including legal advice, and a recommended course of action. Often the policy process requires

consideration of a wide range of options viewed from different aspects and in a variety of configurations.

5. The present collection of documents shows the efforts of one ministry, Management Board Secretariat, to reduce its costs. It ranges from a speech to Cabinet by the Minister (Chair of Management Board) through submissions to Management Board of Cabinet (a committee of Cabinet) on the ministry's estimates and business plan, to briefing notes for members of Cabinet on these submissions. Many of them are of general application; a few deal exclusively or almost exclusively with the closing of Go-Temp.

6. The relevant parts of these documents touch on the government's policies on human resource management, a very sensitive issue that may involve questions of the proper size of government itself, the manner in which public services are delivered to the public, the role of the private sector in supplementing or supplanting public sector services, and the like.

7. In addition, the documents set out options for reducing public expenditures as a series of options, comparing the feasibility and desirability of some with others. Some of the options not chosen may come under consideration for future decision. Revealing other options, especially those not chosen, may create misleading and unnecessary unease among those who might appear to be affected by them.

8. The context of Cabinet's deliberations must also be kept in mind. The documents may reveal government strategies to deal with personnel matters that are still in force or still a matter of negotiation. The collective agreement, made in 1996 after a lengthy strike and difficult negotiations, remains in effect. Sensitive legal and political aspects of the government's compliance with its obligations may emerge from the document, to the detriment of the government's position in ongoing and future discussions with the Union.

9. Labour relations matters involve continuing negotiation and shifting advantages over the life of a collective agreement and on its renewal. They therefore require a high degree of secrecy, to avoid prejudicing negotiating positions and strategies that are of nearly constant relevance to the operations of government.

10. In short, the issues discussed in the documents relate to the formulation of significant, complex and sensitive public policy which has been the subject of intense and ongoing discussion in Cabinet and the Legislature and among the public.

11. Further, many of the documents have only the most marginal relevance to the dispute before the Board. References to the potential closure of Go Temp are few and far between. The other material in these documents may or may not have been the subject of Cabinet decisions or government announcements. It would be highly prejudicial to government operations to fuel speculation about other policies through the release of these documents.

12. I have reviewed the documents in detail to consider whether divulging some parts of the submission would not harm the public interest.

13. The first class of document - those with passing references to Go Temp - should not be disclosed, even only as to those references, because the references are out of context. It is very difficult to tell from them the reasons for the policy, or the scope of the policy, or the stage of the policy in the decision process. Disclosure would be misleading.

14. Another group of documents deal more specifically with the closure of GO-Temp. They are Cabinet documents: submissions and "pink notes" or briefing notes intended for the members of Management Board. In my view all of them raise the concerns expressed in paragraphs 8 through 10 of this affidavit. These concerns are current, not merely historical, though Go Temp's closure has been announced and carried out. The government's approach to such matters, and its current relations with its employees' bargaining agents, stand to be affected by the contents of the documents in ways that may reduce the flexibility of policy development in this area in the future.

15. In my view, releasing substantial portions of these records would adversely affect the proper functioning of Cabinet and the public service. Releasing the narrower portion would present a

distorted view of material that was actually before Cabinet, as well as risk hampering policy development.

16. Disclosing all or part of the Submission would present a misleading, incomplete or erroneous impression of government's present or future policy in this area.

35. Long ago, the Crown was above the litigation fray. Rules which applied to other litigants did not apply to the Crown in the same way or at all. This included rules regarding the production of documents or other information. In essence, documents or information provided to or emanating from the Crown were subject to an absolute privilege and production could not be compelled over the objection of the Crown.

36. Except where the federal government is involved, that is no longer the case. Section 39 of the *Canada Evidence Act* provides an absolute immunity for certain Cabinet documents upon the objection by a Minister or the Clerk of the Privy Council. To the extent that section 39 does not cover a document, and matters of national security or international diplomacy are involved (see section 38 of the *Canada Evidence Act*), any balancing of interests which is left to be done is heavily weighted in favour of a federal Crown claim to immunity.

37. There is no legislation analogous to section 39 of the *Canada Evidence Act* which applies to the provincial Government of Ontario. Accordingly, the Crown in Right of Ontario, the responding party herein, is in much (although not entirely) the same position as any other litigant. No longer is there an absolute privilege which can be invoked by or at the request of the Crown which can operate to avoid production. A more limited public interest immunity may be invoked by or at the request of the Crown, but the Crown holds no veto in that respect. It is for the court or tribunal before which the claim to immunity is made to determine the merits of such a claim, after inspecting the documents for itself if necessary (*Carey v. Ontario* [1986] 2 S.C.R. 637 at page 654; 35 D.L.R. (4th) 161 at page 174 (Supreme Court of Canada)).

38. In considering whether Crown immunity is properly applied to exclude otherwise admissible evidence, the tribunal must balance two conflicting public interests. On one hand, there is a public interest in protecting the integrity and proper functioning of the government decision-making process. The revelation of Cabinet discussions or planning at a developmental stage when there is a significant public interest in the matter may seriously interfere with the proper functioning of the executive. On the other hand, the public interest in the proper administration of justice is a very important one. The former public interest tends to favour non-disclosure, while the latter is promoted by permitting litigants full access to relevant evidence and therefore favours disclosure.

39. It is clear that the public interest in government secrecy does not have absolute priority over the public interest in the administration of justice. This is as it should be in a common-law democracy where there is a separation between the government and an independent judiciary (which for these purposes includes quasi-judicial entities). On the other hand, it is equally clear that secrecy is essential to the proper functioning of a democratic government. The question is how much secrecy is required. In a particular case is whether the public interest in government secrecy outweighs the public interest in the administration of justice.

40. The public interest immunity which the Crown can assert has evolved into an exclusionary rule of evidence. As the Australian High Court pointed out in *Snaky v. Whilom* [1978] 21 D.L.R. 505, it is a "rule of evidence designed to serve the public interest" and it should therefore not "become a shield to protect" government wrong-doing, an observation cited with approval by the Supreme Court of Canada in *Carey, supra*. After all, the purpose of secrecy in government is to promote the proper functioning and legitimate concerns of government, not to facilitate improper conduct. As Lord

Sacrament asked rhetorically in *Burma Oil v. Bank of England*, [1979] 3 All E.R. 700 (House of Lords) at page 733 (also cited with approval by the Supreme Court of Canada in *Carey, supra*):

What is so important about secret government that it must be protected even at the price of injustice in our courts?

Accordingly, the public interest in the proper functioning of government does not always favour secrecy.

41. In the result, the mere fact that something is a “Cabinet document” does not necessarily mean that it is immune from disclosure. Instead, the two public interests involved (together with any other relevant interest identified in the particular case), must be balanced. Where, on balance, the public interest favours non-disclosure, the immunity invoked by the Crown must be sustained, and any documents or information in the Crown’s possession, power or control to which the immunity is found to properly apply need not be produced or otherwise disclosed, however relevant these may be to the matters in issue. Even secondary evidence of a document covered by this immunity is not comparable (*Air Canada v. Secretary of State for Trade (No. 2)* [1983] 1 All E.R. 910 (House of Lords)).

42. The Supreme Court of Canada’s decision in *Carey, supra*, is the leading case in Canada on Crown public interest immunity. While that decision makes it quite clear that Cabinet documents must be disclosed like any other evidence unless it would be contrary to the public interest to require disclosure, the Supreme Court of Canada has made it equally clear that a tribunal must proceed with caution in that respect, particularly where the documents in question concern decision-making at a high government level. It appears that in balancing the two interests, it is appropriate to consider at least the following factors:

- (a) the level and stage of the decision-making process concerned;
- (b) the nature of the policy or subject involved;
- (c) the contents of the documents themselves;
- (d) the temporal proximity of the decision-making process and policy to the proceeding in which production is sought;
- (e) the importance of the proceeding, and whether production is necessary or desirable to ensure that the case is fairly presented and considered;
- (f) the nature of the allegations.

43. Keeping all of this in mind, it is immediately apparent that some of the documents OPSEU seeks are described very generally. This is understandable since except for the documents which have been specifically identified OPSEU cannot know what documents may exist.

44. However, the affidavit filed by the Crown in support of its claim to immunity is also very general. This is to be contrasted with the situation in *Carey, supra*, where the documents in issue were listed in schedules appended to the affidavit. This is less understandable since the Crown presumably knows what documents it has. However, this lack of specificity does not impede the Board’s ability to make a decision in this case.

45. As I outlined above, what is in issue is “what decision was made when” regarding the Crown’s elimination of its Go Temp Services operation, and to have that service provided by the private sector. The Crown does not deny that such a decision was made and implemented. The issue between

the parties is when that decision was effectively made, and whether it was made at a time and in circumstances which created an obligation on the Crown to reveal that decision to OPSEU during collective bargaining. To put it another way, was the Crown *qua* employer obligated to advise the union during bargaining, of the decision (if any) it had made to eliminate a part of the bargaining unit which had only recently been added to it?

46. I am not satisfied that “all submissions prepared for and/or provided to the Management Board Cabinet, including drafts and all supporting documents, in relation to the privatization and/or consideration of “alternate service delivery” for Go Temp Services (see point #1 in paragraph 8, above) are sufficiently arguably relevant that they should be produced. These are documents which would probably reveal the basis upon which the decision in issue was made, but not what the decision was or when it was made. In the alternative, and notwithstanding that the candor argument has been given little weight in the modern approach to public interest immunity, I am satisfied that the importance of keeping “advice and recommendation” Cabinet documents confidential is greater than the likely probative value of such documents in this case (see, *Masse v. Ontario (Com. & Soc. Services)* (1996) 134 D.L.R. (4th) 20 (Div. CT)). I am therefore satisfied that the public interest immunity applies to these documents, and that they should not be disclosed for that reason as well.

47. The description “Ministry’s Business Plan as it relates to GO-Temp Services” tends to suggest a different type of document, in the sense that a “Business Plan” suggests that decisions have been made. However, as I understand it, “Management Board Secretariat” and “Management Board of Cabinet” are not the same thing. The former is a Ministry of the government. The latter is not. Indeed, the latter is “Cabinet”. The manner in which OPSEU had described this document suggests that it is in the same class as the other document referred to in point #1 of paragraph 8 above; that is, that it is a document submitted by the Ministry to Cabinet as a proposal. As such, it would be a suggestion or advice to Cabinet and not a decision of Cabinet. Even if it is in an area in which the Ministry can and does effectively make decisions, it does not present as such in this case, even if at some subsequent point Cabinet adopted it in its entirety. Accordingly, the reasoning in the previous paragraph applies equally to this document, and it need not be produced both because it lacks probative value, and because the public interest immunity claimed by the Crown applies to it.

48. The “Business Plan, Estimates and the Budget” document or documents referred to in point #2 of paragraph 8, above, present differently. It is not clear whether this refers to one or more than one document. In either event, reference to this is found in a document which is Exhibit #18 in this proceeding.

49. Exhibit #18 consists of three e-mails. The subject of the e-mails is identified as being “Status of GO-Temp Program - Reply - Reply”. The first specifically asks whether a decision has been made about the “fate” of the GO-Temp Program. The second responds that the decision has been made, “as stated in the Business Plan, Estimates and the Budget” but not implemented. The third e-mail asks how imminent implementation is.

50. Accordingly, the “Business Plan, Estimates and the Budget” referred to in Exhibit #18 appears to reflect a decision which had been made, and which has since been publicly implemented. Insofar as the document(s) reflect a decision which has been made, and implemented during the life of the collective agreement which was the subject of the bargaining which is under scrutiny in this proceeding, it is relevant to the matters in issue. To the extent that the document(s) reveals an effective decision, the Crown cannot assert a labour relations secrecy, since this is the very matter in issue.

51. Further, to the extent that any such document reflects an effective decision, it is not part of the decision-making process which *prima facie* requires public interest immunity protection in the context of this case. It is both necessary and desirable that such a document be produced in this

proceeding, where the issue is whether the Crown has violated its own legislation. Finally, notwithstanding the on-going nature of a collective bargaining relationship, and notwithstanding that collective bargaining parties are entitled to some secrecy in developing on-going collective bargaining positions strategies, complaints such as this one require a forensic analysis of the *past* collective bargaining conduct of the parties. I am not satisfied that the fact that other probative documents are already in evidence or may be available is a reason to refuse production. On the basis of the materials before me, I am satisfied that the balancing of interests favours disclosure and public interest immunity does not apply to this document.

52. For the reasons given in paragraph 46, above, “all documents, reports, memoranda or any other material that was either prepared for or reviewed in the preparation of the Interim Report” referred to in point #3 of paragraph 8, above, (which interim report is part of Exhibit #20 in the proceedings) are both not relevant and subject to the public interest immunity. They need not be produced.

53. Having regard to the caution which the Supreme Court of Canada has held should be exercised in these matters, I am not prepared to order production of the Business Plan, Estimates, and the Budget referred to in Exhibit #18 directly to OPSEU. Instead, I order the Crown to forthwith deposit those documents with the Board for my personal and confidential inspection. If upon inspecting the documents I am satisfied they should be produced to OPSEU, the Board will make them available to the union.

Illo goes here

3730-95-M; 3756-95-M Ontario Public Service Employees Union (OPSEU), Applicant v. The Crown in Right of Ontario represented by Management Board of Cabinet, Responding Party; Association of Management, Administrative and Professional crown Employees of Ontario (AMAPCEO), Applicant v. The Crown in Right of Ontario represented by Management Board of Cabinet, Responding Party

Crown Employees Collective Bargaining Act - Employee - Management Board, OPSEU and AMAPCEO disputing whether Bill 7 amendments to Crown Employees Collective Bargaining Act (CECBA) resulting in exclusion of certain positions at Ontario Financing Authority from bargaining units - Bill 7 amendments specifically excluding application of CECBA to persons employed at Ontario Financing Authority who spend significant portions of time at work in borrowing or investing money for the province or in managing assets and liabilities of Consolidated Revenue Fund, including persons employed to provide necessary technical, specialized or clerical services - Board finding Province of Ontario Savings Office customer service representatives not excluded from CECBA - Board determining that Financial Officers, Manager of Administrative Services, Project Manager (Capital Markets) Programmer, and Bank funding and Fiscal Agency Supervisor excluded

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

APPEARANCES: *D. Eady* and *E. Wesley* for OPSEU; *S. Barrett* and *Gary Gannage* for AMAPCEO; *B. Loewen*, *C. Simpson* and *Anna Hoad* for the responding party.

DECISION OF THE BOARD; April 21, 1998

1. These are two applications for the determination of the status of a number of employees of the Ministry of Finance working in the Ontario Financing Authority (OFA), heard together on consent of the parties. The parties are in dispute as to whether the Bill 7 amendments to *The Crown Employees Collective Bargaining Act*, referred to below as CECBA, have resulted in the exclusion of a large number of positions from the bargaining units represented by the applicants OPSEU and AMAPCEO. This decision deals with the following positions, all in the OFA:

A. In relation to the OPSEU bargaining unit -

1. Customer Service Representative - Province of Ontario Savings Office (POSO);
2. Money Markets and Foreign Exchange Analyst (Trader);
3. Financial Officer - Swaps, Recording and Payment Position; and

B. In relation to the AMAPCEO bargaining unit -

4. Manager, Administrative Services;
5. Project Manager (Capital Markets Programmer); and
6. Bank Funding and Fiscal Agency Supervisor.

2. At the commencement of the hearing OPSEU agreed that the second position listed above, Money Markets and Foreign Exchange Analyst (Trader) had been properly excluded. Thus, five positions remain in dispute.

The issue

3. The parties are in dispute over whether all employees of the OFA have been excluded by Bill 7, and if not, where the exclusion line has been drawn. The principal statutory provision requiring interpretation is section 1.1(3) of the CECBA as amended by Bill 7. It reads as follows:

- (3) This Act does not apply with respect to the following:
1. Members of the Ontario Provincial Police Force.
 2. Employees of a college of applied arts and technology.
 3. Architects employed in their professional capacity.
 4. Dentists employed in their professional capacity.
 5. Lawyers employed in their professional capacity.
 6. Physicians employed in their professional capacity.
 7. Provincial judges.
 8. Persons employed as a labour mediator or labour conciliator.
 9. Employees exercising managerial functions or employed in a confidential capacity in relation to labour relations.
 10. Persons employed in a minister's office in a position confidential to a minister of the Crown.
 11. Persons employed in the Office of the Premier or in Cabinet Office.
 12. Persons who provide advice to Cabinet, a board or committee composed of ministers of the crown, a minister or a deputy minister about employment-related legislation that directly affects the terms and conditions of employment of employees in the public sector as it is defined in subsection 1(1) of the *Pay Equity Act*.
 13. Persons who provide advice to Cabinet, a board or committee composed of ministers of the crown, the Minister of Finance, the Chair of Management Board of Cabinet, a deputy minister in the Ministry of Finance or the Secretary of the Management Board of Cabinet on any matter within the powers or duties of treasury Board under sections 6, 7, 9 or 9 of the *Treasury Board Act*, 1991.
 14. Persons employed in the Ontario Financing Authority or in the Ministry of Finance who spend a significant portion of their time at work in borrowing or investing money for the Province or in managing the assets and liabilities of the Consolidated Revenue Fund, including persons employed in the Authority or the Ministry to provide technical, specialized or clerical services necessary to those activities.
 15. Other persons who have duties or responsibilities that, in the opinion of the Ontario Labour Relations Board, constitute a conflict of interest with their being members of a bargaining unit.

The Board's Jurisdiction

4. The decision of the Board, differently constituted, in the interim relief application in this matter, *The Crown in Right of Ontario represented by Management Board of Cabinet*, [1996] OLRB Rep. Sep./Oct. 780, recorded the Crown's earlier opposition to our jurisdiction, as well as appearing to question that jurisdiction itself. Although the crown has withdrawn its objection, the Board entertained argument on its jurisdiction to hear this matter.

5. In light of the parties' arguments and our review of the statutes, we have determined we do have jurisdiction to hear this matter either on consent of the parties or pursuant to section 114(2) of the *Labour Relations Act, 1995* (the LRA). Section 114 provides as follows:

114. (1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

Other provisions relevant to our determination as to jurisdiction include the following excerpts from CECBA, as amended by Bill 7:

1(1) In this Act,

"Crown employee, means a Crown employee as defined in the *Public Service Act*.

(2) The Act does not apply with respect to,

- (a) individuals who are not Crown employees;
- (b) agencies of the Crown that are not designated under clause 29.1(a) of the *Public Service Act* that employ only individuals who are not Crown employees.

• • •

2(1) Subject to subsection (2) the *Labour Relations Act, 1995* shall be deemed to form part of the Act.

- (2) This part sets out modifications to the provisions of the *Labour Relations Act, 1995* that apply in the circumstances of this Act.

• • •

19.(1) The application of section 114 of the *Labour Relations Act, 1995* with respect to Crown employees is subject to the modifications set out in this section.

(2) Despite subsection 114(2) of *The Labour Relations Act*, no person shall be found to be a Crown employee unless he or she is considered to be a Crown employee under the *Public Service Act*, 1993, c. 38, s.19.

Thus the *Labour Relations Act, 1995* is incorporated into the CECBA, subject to specific modifications set out in the CECBA. One of those is subsection 3(1) of the CECBA which provides that subsection

1(3) of the *Labour Relations Act, 1995* is not part of the CECBA. Subsection 1(3) sets out what are commonly referred to as the managerial and confidential exclusions, the usual subject matter of an inquiry under subsection 114(2). It provides as follows:

1(3) Subject to section 97, for the purposes of this Act, no person shall be deemed to be an employee,

- (a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practice in Ontario and employed in a professional capacity; or
- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

6. CECBA is, as can be seen, an amalgamation of portions of the LRA and CECBA. We have concluded that, given the results of this structure, the question, “Who is an employee?” in an application under section 114(2) arising in the CECBA context is indistinguishable from the question as to whether a person is an employee to whom CECBA applies. Both the nature of the most recent amendments to CECBA, and the history of the function of the Board under section 114(2) support this conclusion.

7. When adopting Bill 7, the Legislature incorporated the *Labour Relations Act, 1995* into CECBA, (rather than incorporating CECBA into the *Labour Relations Act, 1995* as had previously been the case). It specifically incorporated the definitions in the *Labour Relations Act, 1995* by virtue of subsection 1(2) of CECBA. Thus, the word “employee” in section 114(2) and in CECBA carries with it the same meaning as it does under the *Labour Relations Act, 1995*, unless specifically modified by CECBA. It has not been so modified. The definition under the *Labour Relations Act, 1995* is not extensively substantive, indicating only that the word “employee” includes dependent contractors. However, that is an essential signal to interpreters of the word “employee” in the context of a labour relations statute indicating that one is not looking just at whether a person is in an employment relationship (although that will sometimes be the issue at hand). One is more fundamentally looking at the nature of the work relationship to see if it was intended by the Legislature to be governed by the statute in question for collective bargaining. The determinations of employee status that the Board had made under subsection 114(2) have always been informed by that purpose. The Legislature must be presumed to have been aware of that when rearranging the CECBA structure.

8. Further, subsection 19(1) of CECBA as amended specifically contemplates the use of section 114(2), subject only to the proviso in subsection 19(2) that a person will not be found to be a Crown employee unless considered to be so under *The Public Service Act*. There is no issue in regards to that proviso in this case. All the persons in positions in dispute are Crown employees in that larger sense. Thus, the only express limitation on the use of subsection 114(2) in the CECBA context does not apply in this case. Subsection 114(2) is therefore available to serve the same purpose as in employee determinations under the *Labour Relations Act, 1995*. Indeed, if it is not to be used for this purpose, its incorporation into CECBA makes little sense. Section 114(1) already gives the Board the general jurisdiction to determine all questions of law and fact that arise in any matter before it. If, in any other proceeding between the Crown and an employee organization under CECBA, a question arose as to whether CECBA applied to a group of employees, there can be no question as to the Board’s jurisdiction to determine that question. Section 114(2) provides an avenue to bring questions of whether a person is an employee to the Board directly during bargaining or during the operation of the collective agreement - an important tool for clarifying matters available to all parties subject to the LRA’s jurisdiction.

9. The traditional shape of an application to determine employee status under subsection 114(2) has been a consideration as to whether a person was excluded under sub-section 1(3) of the

LRA, most often as managerial or confidential. If one looks for similar provisions in CECBA, the parallel language for the managerial and confidential exclusions are now in the list of categories to which the Act does not apply. There is nothing in the combined structures of CECBA and the *Labour Relations Act, 1995* which warrants the conclusion that the placement of the managerial and confidential exclusions in such a list, rather than in a structure like subsection 1(3) of the LRA was meant to have the result that such determinations were not to be made directly. Indeed, the choice of wording in section 19 of CECBA is curiously indirect if that was the intended result.

10. Further, although the argument in this case, as will be seen in detail below, revolves around whether or not CECBA applies to employees in the OFA, an alternative way to ask the question is whether the OFA employees in question are employees within the meaning of CECBA. That is the core question before us, in our view. The fact that answering it requires looking at the list of categories excluded does not change the essential nature of the task.

11. Further, we note that there are several portions of CECBA which refer to employees, outside of the defined term “Crown employees”. For instance, see subsections 7(4), 7(6) and 51(2) referring to the remedial powers of the Grievance Settlement Board (GSB) in regards to employees, as well as the many references to employees in the bargaining unit (subsections 24(1), 25(1), and (7), 26, 27(1), 28(1) through (4) and 32(2)). Whether the OFA employees are such employees is an indistinguishable question from whether they are employees excluded by subsection 1.1(3)(14) set out above. It would be in our view a prime example of the triumph of form over substance to find that the Board could determine whether the OFA employees are employees referred to in other sections of CECBA, but not the underlying question of whether they are employees excluded by section 1.1(3)(14). Thus, we agree with the parties that we have jurisdiction to hear this application.

12. In any event, in the determination of our own practice and procedure, we are of the view that the parties’ consent to our hearing the matter directly removes any barrier to our determining this matter. As was submitted by counsel, it could be considered a preliminary question as to whether any application could proceed before us in regards to these individuals.

The facts

13. The parties appeared before us with an extensive Agreed Statement of Facts on which we have relied, in its entirety, and for which we thank counsel. The salient points of the general sections are set out here in abbreviated form, and those more pertinent to particular disputed positions will be dealt with in the portions of this decision dealing with the five remaining positions in issue. The parties are agreed that all of the people in the disputed positions are employed by the OFA, and are Crown employees under the *Public Service Act*.

14. The Ontario Financing Authority (“OFA”) is a corporation without share capital established by the *Capital Investment Plan Act, 1993* (“CIPA”), and it exercises its powers as agent for the Province. The statutory objects of the OFA include:

- assisting the Province and public bodies to borrow and invest and managing their cash and their currency and other financial risks;
- providing such other financial services as are considered advantageous to the Province or any public body; and
- operating the Province of Ontario Savings Office.

15. The OFA has a Memorandum of Understanding with the Minister of Finance (“MOU”) which requires the OFA to:

- plan and co-ordinate the financing and investment programs of the Province;
- provide cash management, banking and risk management services;
- act as borrowing agent and/or issuer of debt for the Province and public bodies and provide financial expertise and advice;
- raise money to finance capital investment for the Province, discharge provincial debt and fund the CRF;
- continue the operation and services of POSO (formerly operated directly by the Province rather than through the OFA).

16. The Consolidated Revenue Fund (“CRF”) consists of money deposited at the credit of the Minister of Finance or a crown agency approved by the Lieutenant Governor in Council. The principal and interest expenses incurred in respect of the Province’s borrowing and the expenses relating to investments and risk management instruments are liabilities of the CRF. The OFA is also responsible for investing money comprising the CRF until it is required to be spent and for funding the Province’s borrowing requirements. The OFA manages the resulting debt and investment portfolios of the Province as well as the flow of money into and the payment of liabilities out of, the CRF. Because the OFA’s services are provided almost entirely to the Province directly (as opposed to services to crown agencies or other public bodies), the OFA’s expenses are all charged to the Provinces’ public debt interest expense (“PDI”).

17. The OFA is organized into five divisions under the Chief Executive Officer;

- Capital Markets (which includes the Risk Management branch) - The trader position, which is no longer in dispute, is from this section.
- Province of Ontario Savings Office (POSO) - Two disputed positions, Customer Service Representative (OPSEU) and Manager Administrative Services (AMAPCEO) are from the POSO division.
- Corporate Finance - None of the positions dealt with in this decision are from this division.
- Risk Control, which includes the Systems branch, and the disputed position of Project Manager (Capital Markets Programmer) (AMAP-CEO)
- Capital Markets Treasury - Two disputed positions, Financial Officer - Swaps (OPSEU) and Banking Funding Fiscal Agency Supervisor (AMAPCEO) are from this division.

18. Prior to the introduction of the *Labour Relations and Employment Statute Law Amendment Act* (“Bill 7”) in 1995 all of the positions dealt with in this decision had been included within the respective bargaining units and were subject to the terms and conditions set out in the previous collective agreements with OPSEU or the voluntary recognition agreement with AMAPCEO. The Employer acknowledges that for the positions involved in the present hearing, there have been no material changes in the functions or duties of the positions that would warrant their exclusion from the bargaining unit on grounds other than those introduced by subparagraph 1.1(3)14 of Bill 7.

19. Pursuant to s. 67(2) of Bill 7 and its interpretation of the amendments regarding the application of CECBA, the employer indicated its intention that all of the employees of the OFA would

cease to be members of their respective bargaining units on February 8, 1996, 90 days after the section came into force.

20. The respective unions filed the present applications challenging the Employer's exclusions and applications for interim relief requesting that none of the challenged positions be excluded pending a decision on the merits. The AMAPCEO interim application was withdrawn pursuant to a settlement. OPSEU's request for interim relief was denied pursuant to the decision of the Board referred to above.

21. Pursuant to the settlement with AMAPCEO regarding their interim application, all of the employees affected ceased to be included in the bargaining unit effective February 8, 1996. However, their current terms and conditions of employment continued to apply and they were treated as if they were members of the bargaining unit. The parties agreed, however, that the employees would not have the right to strike until such time as they are determined to be or agreed to be within the bargaining unit. The employer acknowledges that to date, for the positions involved in the present application, this treatment has not resulted in any labour relations difficulties.

22. Employer counsel accepted at the hearing that if the determination the employer made regarding the application of CECBA is found to have been incorrect, the responding party is responsible for making whole the employees in the bargaining units affected by the improper removal from the bargaining unit. Mr. Loewen did not dispute OPSEU's submission that the Government had agreed to reimburse dues with interest if positions are found to be in the bargaining unit.

Arguments and Conclusions

23. The parties' arguments are presented in summary form here, first as to their general submissions and then as applied to the positions in question. Statutory provisions referred to in argument other than the CECBA excerpts provided above are set out as an appendix to the decision.

24. For the employer, Mr. Loewen argues that the purpose of the OFA exclusions is quite different than the usual managerial control exclusions, that the question is not one of whether the people in question are at arm's length from the employer or not. He acknowledges that there is no real evidence of conflict of interest in the years the disputed positions have been in the bargaining unit. The point is that there was legislative change. Counsel argues that the OFA exclusion in para. 14 is more like the traditional exclusion of people who are in positions confidential as to labour relations. The purpose is to ensure that internal strategy and communications on matters so important to government will be handled by people with undivided loyalties. As well it is submitted that the new exclusions are similar to exclusions by category in s. 3 of the LRA, e.g. of domestics, people engaged in hunting and trapping, to which the LRA does not apply. In cases concerned with those exclusions, it is irrelevant whether or not there is a conflict of interest. A person either falls within the category or not. And it is very clear from the transitional provisions that the people in positions covered by the new exclusions were once in the bargaining unit and are now out.

25. Mr. Loewen acknowledges the onus is on the employer because they are relying on a statutory exemption, but argues that it should not be any higher than the onus to establish that the exception applies.

26. Looking at the whole section, employer counsel argues that the main idea is clear: the legislature intended that the maintenance of financial affairs of the province would be outside the coverage of the statute. Management Board and the OFA are centralized agencies responsible for carrying out these activities for the province as a whole. We are asked to find that the distinction

between the centralized agencies and the Ministry of Finance is an appropriate distinction contained in the statute. The list of exclusions attempts to be all-embracing as to those in financial affairs. Counsel submits that also included is any activity integral to borrowing and investing, much as anyone performing activities integral to agriculture is excluded under the agriculture exception in the LRA. Anyone directly involved in the financial activities of the province is excluded.

27. Government counsel submits that the preamble to the Capital Investment Plan Act (CIPA) is the appropriate starting point, as it mirrors the idea of the exclusion. The purpose of OFA is to provide provincial investment and financing programs and this is a short form for the idea behind the statutory exclusions. The employer submits that the amendments intended to exclude all the employees in the OFA, as the entire operation is focussed on financing the operations of the province and all its employees are in a significant way focussed on that. OFA is an integrated whole, which can not be taken apart. For example, people involved in the cash management role and those involved in investing all need to know the risks and effects of one on the other.

28. Since its inception in 1993, the OFA has done very little for other bodies than the province itself, but work for other public bodies is included in its mandate. Thus it is submitted that all employees are currently providing assistance to the province in respect of borrowing and investing and are thus excluded by the wording of paragraph 14. In this context, counsel urges that the plain meaning of the words “the Province” means the Province as a whole, including all its activities, and does not make a distinction between the province and its ministries or agencies. Borrowing and investing by OFA is done for all of these organizations, through a great variety of debt instruments. Counsel notes that the auditors’ report deals with them all together as part of the Province’s financial status.

29. For OPSEU, Mr. Eady puts forward the following general propositions:

- a. The government bears the onus of justifying the exclusion. Reference is made to *St. Clair College* [1980] OLRB Rep. July 1067 at pg. 1073, para. 12. It is argued that the purpose of CECBA is to extend bargaining rights as it was with *The College Collective Bargaining Act* in that case.
- b. There are other ways than excluding all of the OFA to safeguard the integrity of OFA in a strike situation, e.g., essential service agreements. We are reminded that no other employer has the ability to define its own bargaining units, and thus counsel urges us to submit the government’s rationale to careful scrutiny. The legislation could have excluded ALL employees of OFA. Since they did not, it is submitted the Board should draw a line somewhere within OFA, rather than where the government as employer has drawn it, around the outside of the OFA. Counsel notes that the legislature was quite capable of being categorical, in other areas of the list of exclusions, such as when they excluded the whole of the cabinet office in para. 11.
- c. CECBA has to be interpreted in light of the purpose set out in s. 2 of LRA: two of which are relevant - 1. to facilitate collective bargaining and 6. to encourage co-operative participation of employers and trade unions in resolving workplace issues. These apply to CECBA by virtue of s. 2 of CECBA which incorporates the LRA except where modified. No modification of the purpose section has been made. Counsel argues that this is an instruction to include as many people as the interpretation of the statute will reasonably bear. See para 36 of *Transit Windsor*, [1991] OLRB Rep. April 565 and *Fanshawe College*, [1991] OLRB Rep. Sept. 1044 at 1048, para. 12.

30. Looking particularly at the criteria in the paragraph 14 exclusions, OPSEU counsel observes that the Board’s jurisprudence provides helpful indications as to how to interpret them. There has to be regular material involvement at the core of the job functions, rather than incidental aspects of the work. There has to be a clear connection between the exclusion and what the person actually does. Reference is made to *St. Clair College*, cited above, and its reference to *Transair*, 74 CLLC 905 at pg. 1077

31. For AMAPCEO, Mr. Barrett agrees with the thrust of the arguments for OPSEU and submits that the interpretation should be made in light of labour relations sense - particularly in the context of exclusion. But for CECBA, Crown employees would have no bargaining rights. When loss of bargaining rights is at stake, counsel urges that it should be a heavy onus. It is submitted that this is particularly so, where there has been no material change in duties to justify a change, and the Government puts forward no normal or pretended labour relations rationale. Counsel underlines the Crown's acknowledgment in the agreed statement of facts that there is no change in duties, no managerial or confidential basis for the exclusions and that there have been no labour relations difficulties since the agreement to treat the positions in dispute as if they continued to be in the bargaining unit.

32. We are urged to find that there is no meaningful distinction between the government as employer and the legislature in this instance. CECBA applies to other agencies like the WCB, but the exclusions in question are targeted at a particular employer, a division of the employer. Counsel submits that since this was drafted on behalf of the government as employer, the rule of contra preferendum should apply. To exclude all these positions, they should have to do so in the clearest of language.

33. Further, it is submitted that the Board should have reference to the test enunciated in *Driedger on The Construction of Statutes*, by Ruth Sullivan as its fourth canon of statutory interpretation: to avoid absurd, unfair, arbitrary results which are against public policy.

34. We are urged to find that the manner in which the conflict of interest notion is preserved in para. 15 of the list of CECBA exclusions should inform the interpretation of all the exclusions, as it has in the case law from *The Corporation of the District of Burnaby* [1974] CLRBR 1, onward. As in the confidential exclusion, and exclusions of lawyers, the Board has read in limitations from a labour relations perspective. In this respect, we are referred to *Parkdale Community Legal Services* [1977] OLRB Rep. Oct. 661. Counsel notes that in certain of the exclusions in the list, such as everyone in the Office of the Premier or in Cabinet office, there is no room for interpretation, so that when the legislature chooses other wording for other situations, as in paragraphs 12, 13 and 14, referring to people with particular functions, there must be a belief that there would be a conflict of interest. Thus, the opening words of paragraph 15, "other persons" with a conflict of interest.

35. Looking at the wording of para 14 itself, Mr. Barrett urges a focus on the notion of managing assets. Mr. Barrett adopts Mr. Eady's submissions about the CRF, but observes that s. 17(3) of CIPA says the revenues and investments of a corporation under the Act, of which OFA is one, do not form part of the CRF. POSO is one of the divisions of OFA, and counsel submits that the fact that it may do things on behalf of the Minister does not change that. We are asked to find that OFA money is not part of the CRF.

36. Turning to the concept of managing assets, counsel refers to the definition of "manage" in Black's law dictionary: control, direct, take charge of. Counsel submits that it is significant that the legislature chose that word, rather than words like "record, monitor, administer, process, allocate". It is submitted that the government's position slides over the meaning of "managing". Managing is of a higher order, requiring effective control, in AMAPCEO's submission. Counsel maintains that none of the positions in dispute have the requisite control and direction of assets of the CRF. Reference is made to *St. Clair College*, cited above, at para 26, pg. 1080 and 1092 where the term "formulation of budgets" and "senior economist" were interpreted purposefully by the Ontario Public Service Labour Relations Tribunal, distinguishing the people collating the information from those making the decisions. The analogy here, says counsel, is traders. They are actually borrowing, but the people below them are not.

37. In reply on the general issues, Mr. Loewen submits that the concept of contra preferendum applies to the interpretation of contracts but not to the interpretation of statutes.

38. As to the cases relied on by union counsel, Mr. Loewen observes that some of the purposes of the statute have changed since the decisions cited. Counsel submits that the purpose of the Bill 7 exclusions are the most relevant, and that it is clear the purpose was to remove people from the bargaining unit as set out in the transition provisions.

39. Employer counsel underlines the analogy of the agricultural exclusion cases in LRA, submitting that just as all who are integral to agriculture, including planter, tender and harvester, all the people involved in managing the assets and borrowing and investing should be excluded. Thus, the person who determines the amount of funds, those who actually invest(the planter), those who track (tenders) and those who make repayment under borrowing (harvesters) should be excluded here.

40. As to the argument that not all of the OFA should be excluded, counsel maintains that it should not trouble the Board to draw a line around all of OFA and that no weight should be given to the Board's musing in the interim relief decision to the effect that some of the positions may be in and some out.

41. As to the argument that the wording of para. 15 should inform the interpretation of para. 14 and others, employer counsel maintains that this is an inappropriate interpretation in that conflict of interest cannot be intended to be part of the whole list, or else it would apply to categories like dentists, which makes little sense. Counsel says that para 14 is its own context, and the other paragraphs are other exceptions, which could have been applied if they were relevant.

42. Counsel responds to the unions' reliance on *St. Clair College*, cited above, to the effect that there is a very substantial difference in statutory language which renders irrelevant much of what is said in those cases about the level of decision making.

43. As to the point that the positions in question could have been dealt with through the essential service provisions - Mr. Loewen grants that could have been done, but observes that the legislature chose instead to exclude them entirely.

* * *

44. Having considered the arguments, we find the wording of the statutes and the pertinent jurisprudence support the following general principles:

1. The statute must be interpreted in light of its purposes, both general and specific. The general purpose of CECBA is to extend collective bargaining to employees of the Crown. More specifically, the recent amendments refined the list of exclusions in a detailed way, from which the intent of the amendments themselves, integrated with the rest of the statute, must be determined. Although the intent of the amendments was clearly to remove some persons from the scope of collective bargaining, when they had previously had access to it, there is nothing in the amendments which signals a dramatic departure from the overall original purpose of the statute - to provide for collective bargaining for Crown employees.

2. External statutes, such as the various statutes governing the financial affairs of the Province, are to be used as an aid to interpretation of CECBA, and the LRA to the extent it is incorporated into CECBA. However, the different purposes of the various statutes must be taken into account.

45. As to onus, all parties agreed that the government has the onus of proof. We do not find it necessary to precisely define how heavy that onus is. The serious consequences of exclusion merit acting only on clear evidence, but the basic standard is still the balance of probabilities. In the positions before us, the onus was not determinative.

46. Looking at the specific wording of the list of exclusions in subsection 1.1(3), it is useful to first attempt an overview of its provisions. Some of the exclusions are based on membership in a specified employment group, without regard to the actual work functions performed, e.g., para. 2 “employees of a college of applied art and technology”, or para. 11, persons employed in the Office of the Premier or in Cabinet Office. Others are excluded according to their actual job functions, such as para. 9 “employees exercising managerial functions or employed in a confidential capacity in relation to labour relations” or para. 12 “persons who provide advice to Cabinet about employment related legislation” or para 14, with which we are dealing. In the latter category, there is more focus on the actual work the people in question perform, rather than where they are employed.

47. The rationale for some of the excluded categories is clear - such as community college employees and police who are excluded because they have their own statute governing their collective bargaining. Some are excluded for reasons related to the independence of their profession, such as lawyers, architects and dentists. Some are excluded for traditional conflict of interest reasons, such as those exercising managerial functions, or in a confidential capacity as to labour relations or who give advice about legislation that directly affects terms and conditions of employment in the public sector. The rest relate to the senior levels of government and its policy making arms, such as the offices of the Premier, ministers of the Crown or Cabinet, and those who advise at that level.

48. Looking then at para 14, to be excluded, individuals must be both:

1. persons employed in the Ontario Financing Authority or in the Ministry of Finance,

and

2. persons who spend a significant portion of their time at work in borrowing or investing money for the Province.

or,

3. persons who spend a significant portion of their time at work in managing the assets and liabilities of the Consolidated Revenue Fund.

We will refer to the above categories together as the financial exclusions.

or,

4. Persons employed in the Authority or the Ministry to provide technical, specialized or clerical services necessary to those activities.

We will refer to this as the support services exclusion.

49. Paragraphs 11, 13, 14 and 15 are new to the legislative scheme. Given paragraph 14’s place in the list of exclusions, and its introduction together with paragraphs 11 and 13, it appears that it is logically part of the exclusions aimed at reserving those employees involved in central policy and financial decision making to the management side of the collective bargaining relationship. Union counsel argued without contradiction that the 1993 amendments to CECBA giving crown employees

the right to strike were likely important to the government's position on the meaning of the 1995 amendments. The grant of the right to strike was not repealed by Bill 7, and the refinements to the list of exclusions are plausibly related to this reality.

50. We have considered Mr. Barrett's argument related to para. 15 of the list of exclusions, to the effect that its conflict of interest criteria should inform the interpretation of the rest of the list. It is our view that the language is not clear enough to interpret it in the manner suggested. It is true that the wording "other persons who have a conflict of interest" could mean that all the other persons excluded also had a conflict of interest. However, certain of the exceptions would not fit with that, such as police and employees of community colleges, who are in their own bargaining units, albeit governed by legislation other than CECBA. As well, the language could simply mean persons other than the ones excluded by the other categories. The fact that no party suggested that any of the people involved had the type of conflict of interest that would be excluded by para. 15 cannot be the end of the matter when para. 14 has such specific language which is not on its face entirely coincident with a conflict of interest exclusion.

51. Mr. Barrett maintains that the government's construction is too broad because it would encompass anyone who participates in a sequence which ends up in the CRF, such as a human resources clerk who generates extra money. Mr. Barrett argued that the final portion of para 14 is worded very ambiguously and that the grammatical structure involved in paragraph 14 means that technically, one would have to fit in both the financial and the support services exclusion to be excluded under the support services exclusion. This is because, grammatically, the word "including" in para. 14 makes the last category a subset of the financial exclusions. Otherwise, counsel submits, this language would apply to 5,000 people working for the Ministry of Finance, mostly represented by OPSEU. Noting that the government has not sought to exclude all those people, counsel says it is too late for the government to take the position that this language should be that broadly construed.

52. Although structurally there is a foundation for this argument, in context it appears to us that the word "including" is used more in the sense of deeming people in the support services category to fall within the group excluded by the paragraph, rather than requiring a person to be doing both functions to be excluded. Otherwise, the support services exclusion would be redundant, because performing the financial functions would be sufficient to achieve exclusion.

53. In our view, the crucial word in need of elaboration in the support exclusion is the word "necessary". We were referred to no precedent on the interpretation of the word "necessary", and we are aware of none in a relevant context. A relevant dictionary definition of the word "necessary" from the Webster's Third New International Dictionary is as follows: "that cannot be done without: that must be done or had: absolutely required: essential, indispensable". Its application will be dealt with in the context of each position below.

54. The thrust of the government's argument is that all the employees in the OFA as presently functioning are part of an integrated whole, necessary to its activities of borrowing, investing and managing the Province's finances. By contrast, the unions argue that "necessary" should be interpreted to mean someone actually working with the people who do the borrowing, investing and managing of the assets.

55. The government's submission that all of the disputed positions (as well as all of the other positions in the OFA) are necessary to the activities of the OFA, requires a consideration of the parties' arguments on the difference in structure between para. 14 and other paragraphs in the list. The unions submitted that some meaning must be given to the difference in structure between paragraph 14, and paragraphs structured like paragraph 11. The legislature clearly and unequivocally excluded all persons in the Office of the Premier in paragraph 11, but chose not to exclude all persons employed in the OFA

or the Ministry of Finance. Instead, they chose to restrict the financial exclusions to those engaged in borrowing, investing, managing of assets, and those in necessary support positions. The unions maintain that the appropriate inference from this choice of language is that the Legislature made a deliberate choice to stop short of excluding all employees in the OFA and the Ministry of Finance. Mr. Loewen submits that this is not necessarily the case. He points to the fact, for instance, that the OFA, by statute, could be playing a much larger role with regards to agencies and Crown corporations than it is presently doing. There is room in its mandate, he submits, for positions that are not performing the functions in the financial exclusions, so we should not find that the current functions of employees are all the functions that the OFA could be performing. Thus, in the government's view, the fact that the result of the application of the criteria to each current position in the OFA is to exclude them all should not be seen as a problem, if the application of the criteria produces a justifiable exclusion in each case.

56. We agree that the focus must be on applying the criteria to the positions in dispute. This is true because of the wording of the paragraph. But it is also true because we do not have all the positions in the OFA before us in any detail. Rather, we have general information about the functions of the various divisions of the OFA. Thus we do not have a basis on which to make a finding on the question of whether any other positions in the OFA have been successfully excluded. However, we do find that the ordinary meaning of the words in paragraph 14 suggest that the intention was to exclude specific people, rather than necessarily the whole agency or Ministry. Thus, the language is not a mandate to exclude all OFA employees from collective bargaining, if the language supports the application of the statute to some positions.

Dealing then with the particular positions in issue:

Customer Service Representations (CSR's) - POSO tellers - OPSEU

57. The Province's retail borrowing takes the form of POSO deposits (including Guaranteed Investment Certificates) and Ontario Savings Bonds. Both are managed through the POSO division. The *Province of Ontario Savings Office Act* provides that the Minister of Finance may "borrow money by means of deposits" and may authorize a crown agency to operate offices for this purpose. POSO is used as the trade name for the offices, but POSO is not an agency of the Crown or other legal entity separate and apart from the Crown. The OFA is the crown agency authorized to operate POSO offices for the Crown to obtain money for the Province through POSO. Currently POSO is the source of about \$2.1 Billion in Provincial Borrowing in the form of demand and fixed-term deposits.

58. Funds required to meet the operating needs of POSO are transferred daily from the Province's bank accounts managed by the Capital Markets Treasury Division ("treasury accounts") to the bank accounts for POSO ("POSO Accounts"). The net amount of funds deposited/withdrawn by customers to/from POSO are transferred daily to/from POSO accounts to/from provincial treasury accounts. Interest rates payable to POSO depositors for their deposits and charges for services to POSO customers are determined by senior management in POSO in accordance with regulations.

59. The Province's other source of retail borrowing, the Ontario Savings Bond program, is managed by the director of the POSO Division. This is done with assistance from senior POSO staff and staff in other OFA divisions. Ontario Savings Bonds are sold by staff in POSO branches as well as through private sector financial institutions. Ontario Savings Bonds generated borrowings slightly in excess of \$1 Billion in 1996.

60. The job description and agreed statement of facts concerning the customer service representatives (CSR) make it clear that the people occupying these positions perform the many tasks necessary

for POSO to receive money and provide financial services to its clients, including the withdrawal of funds previously deposited. They can be summarized by stating that the employees in these positions perform functions similar to a bank teller and general office functions related to that work. The parties are agreed that a majority of a CSR's work is spent conducting client transactions, such as accepting withdrawals and deposits. They do not provide loans, mortgages or trust services. There are a total of 105 people employed in this position across the province in 23 retail branches.

61. For the government, Mr. Loewen argues that the basis of excluding all the POSO employees is section 1(1) of the POSO legislation, which provides that its purpose is to "borrow money by means of deposit". We are urged to find that once the Ministry of Finance gets the deposit, it has borrowed the money. Counsel says that POSO is not a separate agency; it is essentially a trade name for the Ministry of Finance operating as POSO.

62. The government submits that each deposit finds its way back to the CRF, but that nothing turns on whether the Board finds that it does so immediately or after a number of steps. In illustrating this process, counsel refers to the public accounts of Ontario, where the POSO deposits show up as liabilities. It is the government's position that the Customer Service Representatives (CSR's) are clerical positions in support of borrowing, or directly borrowing. There is a statement in the Public Accounts, 1995-6, which says "POSO.. offers demand and short term deposits and Guaranteed Investment Certificates to the public and deposits the proceeds into the Consolidated Revenue Fund". Regardless of whether the money is in the CRF immediately upon deposit in POSO, as the government submits, or later, unless a CSR accurately records each deposit, it is not available to the person who invests it for the Province. Thus, the CSR function is necessary to the activities of borrowing and investing, in the government's submission.

63. Counsel refers to the fact that the money is deposited in a POSO account at the Royal Bank, which is part of the CRF. The Financial Administration Act (FAA) defines the CRF as the aggregate of all public money - one public purse, which is the aggregate of all the little purses. Further s. 19, provides that money raised by loan is a charge on the CRF. Public money is defined to include money raised by way of loan. It is received by public officers. This is a main defining part, as public money is referred to in a variety of statutes, submits counsel.

64. Mr. Loewen notes that the \$2 billion raised through POSO is a significant amount which would have to be raised another way if those deposits were not available. Although it may be a different form of borrowing, this is still borrowing as defined by statute. Further, counsel submits that repayment of the debt, in the form of withdrawals, is an integral part of the borrowing function.

65. The government argues that CSR's act on behalf of the Minister of Finance in receiving money as borrowing, and the reverse, i.e. pay-back, when a depositor withdraws. They also sell Ontario Savings Bonds, which is another source of retail borrowing for the province. Other functions include rental of safety deposit boxes, and Ontario Home Ownership Transactions. Payment of all these activities will go through savings or chequing accounts which are liabilities and assets, borrowing of the Province. When clients purchase a Canada Savings Bond, the money does not belong to the Province, but the money goes through the Province's accounts, decreasing the liabilities of the Province. By virtue of section 19 of the FAA, repayment comes from the CRF. Counsel submits this is part of managing the assets and liabilities of the province, as well as borrowing on behalf of the Province.

66. It is the government's position that the CSR's are excluded by each of the three heads of para 14. It is said they are involved in borrowing and investing because they take money in and put it out, which affects liability, and that they are involved in managing the assets of the CRF, because the ins and outs of POSO accounts directly affect the CRF. To the extent the money is in the till of POSO,

part of the CRF, activities in controlling that are part of managing assets and liabilities of the government. Alternatively, they are involved in clerical activity necessary to support the borrowing, in the government's submission, as the recording of transactions done by the CSR's is necessary to borrowing, although the word "necessary" is not part of the agreed statement of facts on this subject.

67. Anticipating the others' position that funds are not part of the CRF until they are surplus to the operation of POSO, the government takes the position that the definition of CRF is not limited to amounts in the Province's own accounts.

68. Counsel observes that the vast majority of the OFA was formed by transfer of the Office of Treasury's accounts - when the OFA started under CIPA. Before OFA, the Office of the Treasury was part of the Ministry of Finance. Each major bank has multiple treasury accounts. Counsel refers to the agreed fact that funds required to meet the operating needs of POSO are transferred daily from the treasury accounts to the POSO accounts. Counsel refers to the FAA s. 2(2) which provides that the accounts can be in the name of the agency. However, they are all Ministry of Finance accounts, all public money, in counsel's submission.

69. By contrast, it is OPSEU's position that the government has not proven the CSR's should be excluded. Mr. Eady underlines that para. 14 does not say either all OFA, or all POSO employees, as it could have, or everyone in the Ministry of Finance. Moreover, the language is qualified further, by phrases such as significant portion of the time, borrowing, investing, managing, including necessary technical and clerical support.

70. Counsel for OPSEU maintains that the government has not met the standard in the cases, which is to show a clear, rather than an incidental, connection to the purpose of the exclusion. Counsel refers to the trader whom they have agreed should be excluded, whose connection is to borrow, trade, invest and borrow. That is the level at which the legislature excluded, in counsel's submission. The language in paragraph 14, submits counsel, does not allow the government to say, as it is argued they have done in excluding these positions: "We wouldn't like a strike here, so everyone is excluded."

71. OPSEU counsel also submitted that the term "significant portion of the time" should be interpreted so that if a trader only trades 10% of the time, an assistant to the trader should not be excluded just because they are clerical, when it is only 10% of the time which is spent on the relevant excluded function.

72. Mr. Eady also submits that even if it is correct that at some level, everything in POSO is related to borrowing and investing for the province, which the union does not accept, there are a number of things that have nothing to do with either. Examples are clients paying utility bills, or Canada Savings Bonds, doing foreign exchange, buying a safety deposit box, buying a money order with cash, or traveller's cheques.

73. Counsel underlines the view that many things change hands before the money from POSO goes to the CRF. Mr. Eady refers to the public accounts which show that the net proceeds from POSO are deposited in the CRF. Further, the evidence shows that POSO has an account at the Royal Bank in its own name, not in the name of the Ministry of Finance. Counsel says that although it is not clear on the facts whether the money clears to the Head Office account and then to the CRF or directly from the 52 POSO branch accounts, what is going on is a number of transactions which remove the CSR's from necessary direct involvement. It is submitted that they are so far removed from the CRF and any direct link to borrowing or managing assets that the government is not able to establish a direct link. Any link is too indirect to warrant exclusion in OPSEU's submission.

74. OPSEU applies the above argument about the CRF equally to the issue of whether the CSR's invest or borrow for the province. Counsel argues that saying the CSR's borrow is simply a characterization of what they do for the government, an argument, not a fact, without a clear basis in law or the evidence. Counsel argues that there are a number of contra-indications in the material and that there is at least a notional division between POSO and the CRF. In particular, counsel submits that it is not clear that all POSO assets are part of the CRF, as the FAA and POSO legislation only say certain revenues and expenditures are paid out of the CRF.

75. Counsel for OPSEU refers to the definition of public money in the FAA, noting that the money goes through a number of transformations. The deposit to the teller may be given back out or be used for postage stamps, or be netted out and deposited to the Royal Bank. It is OPSEU's contention that it is only at that point that someone decides a net amount will be borrowed by the Province. Counsel submits that the evidence shows that the sequence is that money comes in, cheques are deposited to the Royal Bank and debited to it, and then there is a netting out of cash received against cash withdrawn. A decision is made whether to transfer money to a POSO account from Ministry of Finance accounts, or the reverse, depending on a forecast of POSO's daily needs. If the forecast is that more will be deposited than withdrawn, funds are transferred to Ministry of Finance accounts to either make payments on behalf of the Province or be invested by OFA staff for the Province until it is needed. If the forecast is wrong, money gets transferred back. The people who make these investment decisions, says counsel, make the exclusion, but not the tellers.

76. OPSEU counsel submits there are other indications that POSO money does not constitute part of the assets and liabilities of the province. Referring to section 16.5 of the FAA, counsel notes that ministry money held outside the CRF can be deposited into POSO. If everything was already part of the CRF, counsel queries why such a provision would be needed. As well, counsel refers to the fact that separate financial statements are prepared for POSO as an indication they are not all the same. The fact that funds are listed as receivable from the province, indicates they are different entities. Separate line items indicate net cash of \$20 million, and Ministry funds of over \$9 million, which could be funds referred to under section 16.5 of the FAA, or not, but in any event, there is no certainty that they are part of the CRF.

77. In counsel's submission, s. 17 of CIPA is a further counter-indication, because it indicates money belonging to corporations such as OFA may not be part of CRF until something else happens to it, and that despite the FAA, their revenues do not form part of the CRF. Counsel submits a further indication, is in the public accounts, which reflects the position of the province, but contains a note that "Funds on deposit with POSO are in turn deposited with the CRF of the Province." Counsel terms this an admission that it is only eventually that the funds become part of the CRF. Counsel notes that these are laid before the House and says one can assume there is an interest in the province stating things accurately to the House.

78. OPSEU counsel also makes reference to the OFA Annual Report in which the OFA corporate figures are shown distinct from those for POSO. He notes that the Balance sheet shows a separate line receivable from the Province of Ontario, as with the financial statements referred to above, and that the statement of Net Income and Retained Earnings shows interest revenue paid from the province to POSO, separately from expenditures by POSO to depositors and salaries. Counsel further submits that Note 3 to the financial statements, which say the deposits are part of the CRF, was produced after this dispute arose. He contrasts this with the OFA's 1994 Annual Report, produced prior to the dispute, which provides that "As at March 31, 1994, POSO held deposits of \$2.0 billion, which were in turn loaned to the Province." Mr. Loewen interjected that he had no problem with the annual report, but that it may be a question of what has changed between then and the agreed statement of facts.

79. Mr. Eady refers to the fact that money is fungible and submits that the above is the structure which provides for a 2 or 3 step process before the POSO money becomes CRF money, in the absence of something that says all assets and liabilities of POSO are assets and liabilities of the CRF.

80. In sum, Mr. Eady submits that it is not clear enough that the CSR's are directly involved in borrowing or investing money for the Province or in managing the assets and liabilities of the CRF. Counsel characterizes this as an institutional and duties and responsibilities argument. At the branches employees are not engaged in either borrowing or managing. Thus, counsel urges a finding that there is no regular material involvement of the CSR's in investing and borrowing.

81. Counsel observes that the CSR job description at makes no mention of provincial revenue, assets or liabilities of the CRF. As well, he notes there are also other duties they do; they spend a significant amount of time dealing with things other than money directly. This is not a trader position on the phone cutting deals. We are urged to find that even if POSO has enough connection to the province, the CSR's role is incidental. Counsel submits that if you think of the link between the POSO clerk in Thunder Bay and the trader, it becomes a remoteness issue. Counsel urges us to look back at the language in the statute, the provision for a significant amount of time, and put that together with the fact that there is nothing about borrowing or lending in the job description.

82. Mr. Barrett added that section 2(3) of the FAA may mean that the CSR's collect or receive money, but that does not mean they are borrowing themselves. He asks us to imagine the absurdity of these tellers telling someone they borrow money for a living.

83. In reply on the issues relating to the role of POSO, employer counsel submitted that the fact that references in the various financial statements and reports as to OFA arrangements are stated in various ways, indicates no nefarious purpose. He submits there was an error in the first one referred to by Mr. Eady, a difference he attributes to the difference between a legal and accounting approach.

84. In any event, counsel stresses that the CIPA provides that POSO is an agent of the Ministry of Finance. He submits that when one acts as agent, the assets do not become yours. The fact that the agency is statutory rather than contractual does not change the fact that these are still assets of the CRF. Further, counsel underlines that section 4 of the POSO Act provides that all expenses and revenue of POSO are paid into the CRF.

85. Mr. Loewen does not agree that the qualifier "significant portion of the time" applies for the support people. He asserts that the only relevant qualifier for that category is "necessary to these activities". He urges an interpretation that finds that the intention was to exclude anything necessary; it would not be consistent with that to say something necessary will not be there because it does not take up a significant portion of the time.

86. As to OPSEU's contention that the CSR's are not borrowing, counsel submits that all POSO money flows directly to and from CRF, so that even a credit card payment is part of the assets and revenues which go directly into the CRF. But more importantly, says counsel, this is incidental to the real issue which is that the statute, the POSO Act, says they are borrowing by deposit. Therefore all the CSR activities have to be part of borrowing. The main legal foundation is that their function is integral to borrowing because of the statutory provisions. Counsel also refers to s. 19 of the FAA which says that all money raised by way of loan and the interest thereon, is a charge on and payable out of the CRF.

87. In response to the argument based on section 17(3) of CIPA, counsel says that POSO is not part of the OFA, but an agent of the Ministry of Finance, and therefore section 17(3) does not apply, (i.e. revenues of POSO are not revenues of OFA, but of the Ministry of Finance.) He submits that

POSO is part of the Crown, and OFA is the agent which operates it pursuant to section 30(1)(d) of CIPA. POSO's revenue is then other revenues of the province. Counsel submits that in the OFA statements, OFA revenue may not be part of the CRF because of section 17(3), but POSO's revenue is, because of its statute. Mr. Barrett interjected that POSO and OFA corporate funds are listed together as total earnings in the OFA's financial statements. To this, Mr. Loewen responds by saying that the differences between legal and accounting purposes are clear.

88. As to the argument based on section 16.5 of the FAA, Mr. Loewen says the section simply allows money held outside the CRF to be deposited in POSO so that it becomes part of CRF. Employer counsel says that union counsel mischaracterize it as a two step process. Further, he notes that the word Ministry has a very broad definition here, including Boards and the casino corporation, for example. As to what constitutes public or Ministry money not in the CRF, counsel says that means assets of an agency not in CRF, such as money used in the Casino Corporation.

* * *

89. We have determined that the CSR's are not excluded from the applicant of CECBA by para. 14. In coming to this conclusion, we agree with and adopt the approach taken in the cases cited above, that it is appropriate to exclude only those people integrally involved in the functions listed. Indeed, the Legislature's choice of words "spend a significant amount of time" may be seen as something of a codification of that idea. This theme has cut across the categories considered in the jurisprudence on exclusions from collective bargaining. The unifying idea is that lower level involvement in an excluded function is not normally sufficient to warrant exclusion from collective bargaining, where the Legislature's general intent was that employees would have access to collective bargaining. The various tribunals have required material involvement, independent decision making, authority or control in the area excluded. So, persons with incidental exercise of supervisory responsibilities or who operate at a level where there is not a significant focus of decision making are not excluded as managerial, (See *Transair Ltd.*, 74 CLLC 95 (CLRB) and *St. Clair College*, cited above), those with clerical responsibilities for payroll information are not excluded as confidential to labour relations (See *Frito-Lay Canada*, [1978] OLRB Rep. Sept. 831), those with junior responsibilities for financial matters are not excluded as those who formulate budgets (See the reference to the Ontario Public Service Labour Relations Tribunal's decision in file 1612-78-M the "Dean case" in *St. Clair College*, cited above). Paragraph 14 does not deal with the traditional "conflict of interest type criteria", but the precedents are useful in the manner indicated.

90. In our view, the appropriate extension of the jurisprudence, cited above, to the financial exclusion in paragraph 14, requires there to be meaningful involvement at work in the decision making activity involved in borrowing, investing or managing assets in order to find that CECBA does not apply. In our view, this means involvement in committing the Province or the CRF financially to a borrowing or investment transaction, or a significant role in making decisions about, as opposed to implementation of others' decisions about, the management of the assets of the CRF. Managing assets means, in our view, decision making directed at maximizing assets and minimizing liabilities, as well as meeting obligations under financial commitments made. And in order to be excluded by the related support services exclusion, the job tasks required should be immediately related to the ability of those who meet the financial exclusion to carry out the activities which are the focus of the exclusion. Applying the ordinary meaning of the word necessary, the function of the support person must be one without which the primary person cannot carry out his or her activities of borrowing, investing or management of assets. Given that the overall purpose of the statute is to extend collective bargaining rights, we are of the view that it would not be appropriate to exclude everyone needed by the organization, in the more general sense that everyone employed by the OFA is no doubt considered necessary to the organization in some way. Rather, in our view, the appropriate purposive interpretation

requires that the threshold be whether the support person is necessary to the performance of the core activities which are the focus of the exclusion.

91. We start with the agreed statement of facts in regards to the CSR's job duties and their job description. It is clear that the actual content of their jobs, and the skills, abilities and qualifications necessary to do them, do not call on them to borrow, invest, or manage assets. The CSR's accept and pay out funds, make records of transactions, and perform a myriad of clerical tasks. Their job description summarizes these as banking and cashiering services. This is usefully contrasted with the job description of the trader who is now agreed to be properly excluded. That job description includes duties such as the execution of financial transactions, as well as requiring experience in transacting financial instruments, advanced negotiating skills and independence for decision making.

92. In applying the general concepts discussed above to the question of whether the CSR's are encompassed by the paragraph 14 exclusion, the description of their duties as a cashiering function clarifies the situation. Although some of the cash they take in will be part of the Province's debt burden, their role is a front-end one. A cashier is necessary to the operation of a retail endeavour of any kind, and the cash which they handle will be necessary to the survival of the operation. This is no less true of POSO than of a grocery store. But the grocery cashier does not make decisions in regards to borrowing, investment, and management of assets which commit the enterprise financially. Nor do the CSR's. It is in this sense that we find that they are not encompassed by the financial exclusion.

93. Mr. Loewen argued, as we have noted, that the overall function of the OFA, and POSO, requires that the CSR's be found to be involved in borrowing, investing or managing assets. It is clear that one of the functions of POSO is to attract funds for borrowing and subsequent investment on behalf of the Province. But the wording of paragraph 14 focusses much more locally on specific persons, with specific work functions. Just as those who do inventory, shipping and receiving for XYZ Manufacturing Inc. are not themselves manufacturing, although the enterprise certainly is, we do not think the receipt of money by the CSR's makes their job one of borrowing, investing or management of assets.

94. We take a similar view of the arguments made on the combined effect of the POSO Act, the FAA and the CIPA. There is no doubt that one of the things the Minister of Finance is achieving by having POSO operated by the OFA is borrowing for the Province. The agreed facts make that clear. Nor is there any question that money handled by the CSR's is public money, even if the unions are correct that it is not actually part of the CRF until it leaves the POSO system, or its branches. In that respect the CSR's are agents of the Crown, and accountable for the money they handle. But it must be kept firmly in mind that our task is to interpret CECBA, a statute focussed on collective bargaining, which defines an exclusion in terms of the activities of particular persons at work. It does not define the exclusion in terms of the structural mandate or corporate functions of a whole agency as defined by statutes like the CIPA and the POSO Act. And in our view, to so interpret it would be to divorce the interpretation of CECBA from the actual activities performed at work by the people in question and the wording of paragraph 14, which focuses on activities at work. The wording could have drawn the exclusion at the corporate level, but did not. Mr. Loewen suggested the preamble of CIPA as a useful starting point. We are of the view that the preamble makes clear that CIPA's purpose is to structure centralized provincial corporations. There is nothing to suggest that statute had labour relations objectives at all. And our interpretation of CECBA does not conflict with CIPA. Rather it focuses, as directed by para. 14, on actual work function.

95. But what of the support services exclusion? Are the CSR's not persons employed to provide technical, specialized or clerical services necessary to the activities which are the focus of the exclusion? A close look at the structure of paragraph 14 warrants a finding that they are not the object of this portion of the exclusion either. Only persons whose functions are necessary to the activities caught by

the financial exclusion are excluded by the support staff exclusion. What are those activities? The activities referred to are spending time at work in borrowing or investing money for the Province or in managing the assets and liabilities of the CRF. There is no evidence that anyone employed to borrow, invest or manage assets and liabilities of the CRF requires the CSR's services in order to carry out the activities which are the focus of the exclusion. The evidence supports a finding that without an inflow of cash from POSO, the Province would have to borrow the same amount elsewhere. But those who do the borrowing and investing could still borrow and invest without the CSR's, albeit through a different borrowing or investment strategy. Those who manage the assets and liabilities of the CRF could do so, albeit perhaps with a lower bank balance. In the result, we find that the CSR's are subject to the application of CECBA.

Manager, Administrative Services - AMAPCEO

96. The person in the position of Manager, Administrative Services provides managerial and administrative services for POSO, principally in the area of cash management, budget preparation and control, financial and accounting administration, personnel, records management, accommodation, purchasing and interest rate administration. The person in this position also monitors the 52 POSO corporate accounts daily to ensure the combined balances are close to zero balance to avoid interest or overdraft charges and to maximize the amount transferred to the Treasury Accounts. Other functions of the position include monitoring the purchase and sale of appropriate amounts of U.S. currency for POSO branches, various accounting functions, tracking interest rates and recommending the rates that the Province will pay to POSO customers. As well, this manager is responsible for the day to day administration of the Head Office of POSO, including the supervision and co-ordination of the activities of the Head Office staff and the provision of various support services such as purchasing, mail processing and accounting services. Further, he or she may be called on to replace the branch manager.

97. The majority of the duties listed in the job description have to do with the administration of the POSO Head Office itself - budgeting, controlling branch expenditures, monitoring manpower and budget, coordinating support services, such as printing, office supplies and mail, giving day to day personnel advice to Branch managers, supporting the director in development and implementation of Branch priorities and administrative policy, troubleshooting for the on-line system, replacing branch managers in an emergency, doing performance appraisals for subordinate staff. Qualifications include particular expertise in financial analysis and preparation of budgeting estimates. The job description sets out the exercise of judgment in a variety of functions.

98. For the government, Mr. Loewen submits that this function is one of cash management relating to POSO as a whole. Part of the role is maintaining the flow of money between the treasury accounts and the POSO accounts.

99. For AMAPCEO, Mr. Barrett submits that nothing hinges on the words "cash management" in the agreed statement of facts. This manager monitors accounts and performs purchasing and accounting functions, in counsel's view. As to the tracking of interest rates, there is no information as to how much time is spent on that, so no basis to find that there is a significant amount of time on it. There is no basis to simply state that all of these functions are managing assets for the significant proportion of time required by the statute. Counsel submits that the onus on the government to show that has not been met. Further he submits that processing, collating, and checking does not amount to managing assets, and the money is not part of the CRF.

100. Counsel for AMAPCEO notes that this employee is one step up from the Branch and does send money off to the CRF, but does not manage it just because he is sending it off.

* * *

101. There are certain problems in categorizing this position in terms of the para. 14 language. Firstly, the incumbent performs a great variety of functions, some of which are quite remote from the core functions which are the object of the exclusion, such as purchasing office supplies and performing routine personnel functions which include maintaining records and scheduling vacations for staff. Others, however, such as cash flow management on the movement of funds on a daily basis between Treasury and POSO and recommending the interest rate the Province will pay on deposits and other financial products, are much more closely related to the core functions of borrowing, investing and managing the CRF. Although there is no basis in the evidence to conclude how much time is spent on the process of recommending the interest rate, the cash flow management function is listed as a major responsibility.

102. There is no evidence that the Manager, Administrative Services is making borrowing, or investment decisions in the sense outlined above of committing the Province financially. In terms of the heading managing the assets and liabilities of the CRF, he is involved in cash management aimed at maximizing what is transferred to the treasury accounts. No argument was directed to the question of whether POSO itself, or its head office, is an asset of the CRF, but rather to whether or not the funds in POSO are part of the CRF. For the Manager position, the main question is whether the function of monitoring and tracking of the cash which flows into the treasury funds to maximize the amount going to treasury is properly characterized as managing the assets and liabilities of the CRF. We find that it is.

103. Our reasoning for this starts with the fact that all parties accept that overall net POSO deposits become a liability of the CRF. This can be demonstrated in the various statutes. For example, section 19 of the FAA provides that all money raised by way of loan is a charge on the CRF, and subsection 1(4) of the POSO Act requires all POSO revenue to be paid into the CRF as well as making the CRF ultimately responsible for POSO's expenses. Although these provisions do not solve the problem of exactly when any particular funds deposited to POSO become deposited in the CRF, they underline the structural nature of POSO's *raison d'être* - to provide funds to the government, borrowing from depositors as one form of borrowing to meet the Province's financial needs. The evidence provides the basis for a finding that for various purposes, such as Note 4 to the Public Accounts, or subsection 1(4) of the POSO Act, or section 16.5 of the FAA, money is considered as not immediately in the CRF, but subject to be deposited into it. However, this does not change the fact that the overall POSO operation is a liability of the CRF, both by law under the POSO Act, and as reflected in the public accounts which lists the deposits as a provincial liability. Nor is the situation changed by the fact that separate books are kept for POSO, and that they have their own financial statement which lists money as receivable from the Province. The agreed facts, and the statutes, demonstrate that POSO is not a separate entity apart from government, albeit it is operated by a Crown corporation as the government's agent. As to section 17(3) of CIPA, it is clear that OFA revenues are not part of the CRF but that they may be ordered to be paid into the CRF, pursuant to subsection 17(1). However, there is no evidentiary basis to counter the fact on which Mr. Loewen relies in answer to the unions' arguments about subsection 17(3), i.e. that the assets of POSO are not those of the OFA, but rather those of the Minister of Finance, managed on his behalf by the OFA. The fact that the OFA financial statements melds POSO and OFA funds for some purposes does not counter the basic structural reality.

104. The fact is that the net proceeds of POSO are clearly a provincial liability. This is the essential one for considering what the Manager of Administrative services is doing when monitoring the POSO accounts and performing cash management to maximize what is transferred to the Treasury accounts. It is our finding that this function is short term management of a liability of the CRF in that the decisions made while performing this function directly affect the size of the liability the CRF will receive from POSO. As to whether a significant amount of time is spent on this function, the evidence

is not particularly clear. However, the cash tracking is listed as a major responsibility. In the absence of conflicting evidence we find that to be sufficient to meet the threshold of “significant”. When put together with the function of recommending interest rates to be paid to POSO depositors, which directly affects the province’s liability, we are of the view that this position is properly excluded. Given the nature of many of the other duties, it is appropriate to note that without the functions of cash tracking and recommendation as to interest rates, this position would not meet the paragraph 14 exclusion.

Financial Officer - Swaps, Recording and Payment - OPSEU

105. This position is included in the Accounting and Settlement section of the OFA’s Capital Markets Treasury Division. Generally, the settlement staff

- ensure that debt risk management and investment transactions occur at the required time on the specified date,
- receive information as to the terms of these capital markets transactions as soon as the transactions are entered into, confirm them with the counterparties and enter them into the accounting system, including opening a payment file,
- initiate payment procedures and ensure that payments are made on time, and
- reconcile accounts and ledgers for capital markets transactions and other accounts within the CRF.

106. A Swap is a derivative financial product used to hedge risk. The persons filling the position of Financial Officer - Swaps are responsible for the confirmation, computer entry and monitoring of the details of specific transactions through to settlement to ensure completion of the transaction. The functions are performed in support of the trading activities of the Capital Markets Division, which is responsible for carrying out the Province’s borrowing, risk management and investment programs. It requires judgment and initiative in dealing with financial institutions, in situations such as suggesting improvements to software. A good knowledge of Financial and accounting practices, government accounting, capital market activities and various complex financial instruments is required. People in this position are accountable for the timely completion of thorough and accurate work to eliminate the possibility of serious financial loss or embarrassment to the Province.

107. The Job description for this position states that the incumbent administers the derivative products portfolio to ensure appropriate financial control, reporting and accounting for transactions undertaken by Capital Market traders.

108. The government maintains that all swap functions are an integral part of borrowing. Mr. Loewen notes that the people in each of the financial officer positions take a particular type of instrument and make sure the transaction involved happens when it should; they back each other up. In the alternative, if it is not borrowing, it is clearly a clerical service necessary for borrowing, in counsel’s submission. Some of the functions are part of managing the assets of the CRF; either way the position ends up excluded, in counsel’s view.

109. In support of including the position in the bargaining unit, Mr. Eady underlines that unlike traders, these financial officers do not make the deals, or do the transactions. Their function comes after, checking that the transaction is carried out, based on reports. Counsel argues that there are some practices in which they engage which could be characterized as investing or managing assets, such as

liaising with counterparties, but there is no evidence about how much time is spent on them. Nor is there sufficiently clear evidence to exclude them, as dealt with in the *St. Clair College* case, cited above. In the union's submission, it is insufficient to exclude them just because they are part of the integrated whole known as the OFA. Given the serious consequences of exclusion, and the lack of clear evidence of the criteria being met, OPSEU counsel argues that the government onus has not been met.

110. We are not of the view that these financial officers spend a significant amount of time at work in borrowing or investing money for the Province. This is because they are not committing the Province financially; they do not engage in transactions themselves. Are they managing the assets and liabilities of the CRF? They are certainly performing functions that are part of the management of the liabilities of the CRF. However, there is no evidence to warrant a conclusion that they are managing assets and liabilities in the sense of playing any decision making role in management of the assets and liabilities of the CRF.

111. Are the financial officers employed to provide technical, specialized or clerical services necessary to the activities at which the financial exclusion is directed? The financial officers provide financial control, reporting and accounting for transactions undertaken by the Capital Market traders. It appears that the functions undertaken by the people in these positions are accurately captured by "specialized services necessary to these activities". The financial officer - swaps is not managing in the sense of making financial decisions, but is spending his time making sure that what the fund managers and traders decide actually happens. The connection between the transactions done by the traders and the monitoring of their implementation by the financial officers is sufficiently close to warrant the conclusion that their function is necessary to the management of these liabilities of the CRF by the persons either making the borrowing decisions or related decisions as to management of the resulting debt. It does not have the aspect of remoteness from the decision making functions involved in borrowing, investing and managing assets and liabilities that the duties of the CSR's have.

112. Mr. Loewen argued these positions could be considered clerical in support of borrowing. There are some aspects of the work which are clerical, but the liaising with the counterparties, troubleshooting for the computer system, accounting and financial monitoring aspect of the work distinguishes it from purely clerical in our view. Either would be sufficient to exclude it from the application of CECBA in any event.

113. We have considered Mr. Eady's argument that the evidence is not sufficiently clear to exclude these financial officers when viewed in the light of the standard set by *St. Clair College*, cited above. Although we agree that it is not sufficiently clear to exclude them under the heads of borrowing, investing or managing the liabilities, because these officers are not engaged in the necessary decision making, we found the agreed statement of facts sufficiently clear to come to the conclusions we have made, in the absence of conflicting evidence. We therefore find the position of Financial Officer - SWAPS is not subject to the application of CECBA.

Project Manager (Capital Markets Programmer) - AMAPCEO

114. The disputed position of Project Manager (Capital Markets Programmer) (AMAPCEO) is in the Systems Support Section of the Risk Control division of the OFA. Staff in the Risk Control Division are responsible for monitoring the OFA's borrowing, investing and risk management transactions. This is done in order to measure and report risk levels, to ensure compliance with the Province's limits on risk and public debt interest expense, and to monitor performance of the OFA's borrowing and investing activity for the Province. Risk Control staff also monitor and forecast the Province's public debt interest expense. Staff in this division also monitor and report changes in the credit ratings of parties to capital markets transactions to responsible staff. Risk Control staff also liaise with the

Province's credit rating agencies to secure the highest rating possible for the Province, thereby minimizing its borrowing costs.

115. The OFA's systems branch is included in the Risk Control Division. Systems staff are responsible for identifying, acquiring, and maintaining all information technology required by the OFA in order to carry out its mandate. This includes the OFA's computer hardware, system software, communications technology and special application software. The work of this section involves a significant amount of development by systems staff of specialized programs required for the OFA's activities. These include programs to support the management of POSO deposits, cash management and banking, debt issuance and investing, measuring risk, and accounting for and reporting capital markets transactions.

116. It is agreed that the Project Manager is directly involved in the design and management of production systems in the OFA and identifying, evaluating and implementing technology solutions, including new computer application systems and the development of software appropriate for the OFA's activities. Another function of the person in this position is to educate and train end-users as well as to evaluate the performance of staff. Software created by the incumbent allows staff to analyze borrowing plans to determine their respective impact on the Province's liquid reserve portfolio at any point in time. The incumbent reports to the Manager, systems.

117. For the government, Mr. Loewen points out that part of the agreed statement in regards to this position is that "sophisticated technology is necessary to provide staff with the information necessary to evaluate, record and process individual transactions and to monitor and evaluate the overall financing activities of the OFA." This particular incumbent does actual programming, encoding specifically for the OFA. Counsel observes that the specifics of the agreed statement show that it is his primary role to create new applications or adapt something from a third party to the OFA's particular needs. Counsel submits that for the Capital Treasury division in particular, it is necessary to managing the assets of the CRF as well as specialized technical support necessary to these activities. He elaborated in some detail on the impossibility of doing risk analysis, which is involved in all borrowing transactions, without the support of people like the person in this position.

118. For AMAPCEO, Mr. Barrett submits that the government has conceded that the person in this position is not managing money. Rather the employer relies on the last clause in paragraph 14 "including persons employed to provide technical, specialized or clerical services necessary to those activities." Simply put, Mr. Barrett says, the argument is that you need computers to do this work, but he questioned whether that was the concept captured by the closing language of para. 14. Counsel acknowledges that it is open to the Board to include these positions on the language of para. 14, but submits that these people are not borrowing, investing or managing assets properly interpreted. Further, counsel says the government has not met its onus to prove that the incumbent spends a significant portion of time on the excluded activity.

119. AMAPCEO's position on the support positions is that the OFA may all be integrated but the language of the statute calls for breaking it down into separate functional components. If someone is doing the function of borrowing, trading, one should look to see if there is someone directly working with them. We are urged to limit the exclusions to the functions listed, asking the question: is the work of the support person necessary to the function? We are urged not to exclude everyone who works with computers on the broad basis that computers are necessary in this day and age. In counsel's submission, this Systems person performs a completely separate function from the intended exclusions.

120. This programmer provides technical support to both the capital markets and capital markets treasury divisions. His programs are tailor made to assist staff in those divisions who perform risk analysis and make decisions about timing of hedging transactions. The parties have agreed that

sophisticated technology is necessary to provide staff with the information necessary to evaluate, record and process individual transactions and to monitor and evaluate the overall financing activities of the OFA. The question is whether this is sufficient to exclude this person as necessary to the borrowing, investing or management of the assets and liabilities of the CRF. There are aspects of this position that are not strictly speaking necessary to these activities, such as staff education, and evaluation. However, given the overall thrust of the position is to tailor make tools to analyze risk, it seems it is a position that is necessary to the management of the assets and liabilities of the CRF. We find it properly excluded as specialized, or technical service, necessary to the performance of the excluded activities.

Banking Funding & Fiscal Agency Supervisor - AMAPCEO

121. This position forms part of the Cash Management section of the capital Markets Treasury Division also known as the "Capital Markets Support Division". The Cash Management section must ensure that adequate funds are available daily in the appropriate bank accounts to meet the cash requirements of the Province and the OFA. The incumbent is responsible for accessing the Province's various bank accounts, to obtain the previous day's actual ending balances and debits and credits. He also downloads information from banking systems relating to cheques cashed on CRF accounts, updates the preceding day's cashflow forecast to reflect actual cash flows, reviews and confirms variances and revises the current day's and the short term forecasts. This includes ensuring that banking transactions have taken place as planned and resolving with the banks any problems identified with the accounts. He liaises with the Taxation Data Centre of the Ministry of Finance and other ministries to resolve discrepancies between forecast cash flows and those shown in the province's bank accounts. He assigns projected cashing dates for large cheques to minimize premature funding of CRF accounts and liaises with agencies for whom the OFA is borrowing, e.g. in relation to the expansion of the Ontario Science Centre, to determine when funds are needed. He is responsible for transferring funds, in amounts determined by the cash management officer (for whom he sometimes acts as back-up), between bank accounts as necessary. He has primary responsibility for maintaining the cash forecasting system including determining appropriate data for entry into the system and providing daily analysis of cheque cashing patterns for forecasting purposes. He coordinates the purchase and deposit into the CRF of surplus U.S. dollars from the Ontario Casino Corporation, which are invested or otherwise used by the OFA, in carrying out its risk management strategy or in payment of U.S. liabilities.

122. In support of the exclusion of this position, Mr. Loewen submits that this person is involved in managing the assets of the CRF in the short term to ensure that accounts are adequately funded. Counsel says this also amounts to borrowing, because in the process of determining ins and outs, he determines what money is left over. His other duties are part of the clerical functions necessary to manage the Province's accounts.

123. For AMAPCEO, Mr. Barrett submits that the incumbent keeps the books, and worries about discrepancies, but does no borrowing. He acknowledges that this position deals with the CRF; it is not part of POSO. Counsel describes the position as initiating and monitoring banking transactions. Counsel queries whether it is managing assets to do short-term supervision of accounts and passing on of information.

124. In reply on this position, Mr. Loewen maintained that short term managing is crucial, and certainly part of managing assets, since if all you do is a long term analysis it will not work. Management of the assets has to get down to the day-to-day, and thus should encompass this position. Counsel submits that in the integrated world of government finance, short and long term managing are equally integrally related.

125. As to the unions' arguments that there were no indications as to the proportions of time, Mr. Loewen says that the proportion of time is clear on the agreed statement of activities as some of them give percentages; some list major responsibilities.

126. Having considered the duties of this account supervisor, we are of the view that CECBA does not apply to the incumbent as he is properly excluded as a person employed to provide specialized services necessary to the managing of the assets and liabilities of the CRF. It is conceded that we are here dealing with the CRF; the main duties of this position relate to monitoring of cash accounts to optimize interest earnings and minimize premature payments, which might trigger unnecessary liabilities. We are unable to find on the evidence that he is spending a significant amount of time managing the assets and liabilities himself. Rather he is electronically initiating and monitoring banking transactions to which others in the OFA have committed the Province. Although the function of assigning projected cashing dates for large cheques would fall within the category of managing the assets in our view, this is not listed in the job description or elsewhere in a manner which would allow us to make a finding as to the amount of time spent on this activity. Nonetheless, he carries out large financial transactions on behalf of the province and its Crown employees. In this respect he is performing functions which appear directly necessary to the implementation of investment decisions made by others. In resolving issues around timing and the manner of receipt and inflow of funds, for instance, he is also performing functions necessary to the implementation of decisions about the management of the assets of the CRF. Therefore we find this position excluded.

* * *

127. To summarize then, we find that the following positions are excluded from the application of CECBA pursuant to paragraph 14 of section 1.1(3) of CECBA:

- Financial Officer - Swaps
- Manager of Administrative Services - POSO
- Project Manager (Capital Markets) Programmer
- Bank funding and Fiscal Agency Supervisor
- On agreement, Money Markets and Foreign Exchange Analyst Trader.

The POSO customer service representatives are not excluded.

127. We will remain seized to deal with any issues regarding the implementation of the above decision which the the parties are unable to resolve themselves.

APPENDIX

From the Capital Investment Plan Act (CIPA):

Preamble

The Government of Ontario has announced a capital investment plan for Ontario under which the Government, municipalities and other public bodies, and the private sector will work together to make significant investments in the province's infrastructure. Under the capital investment plan three new Crown agencies will be established and a fourth will be revitalized. These agencies will have responsibilities in the areas of provincial investment and financing programs,

transportation projects, sewer and water projects and the management of the provincial land and building inventory. Legislation is required to establish the new Crown agencies and to continue the Ontario Land Corporation as the Ontario Realty Corporation. Complementary amendments were required to several Acts to implement the plan and to provide for certain other matters related to the financial administration of the Province of Ontario.

2.-(1) The following are established as corporations without share capital:

1. A corporation to be known in English as the Ontario Financing Authority and in French as the Office ontarien de financement.
2. A corporation to be known in English as the Ontario Transportation Capital Corporation and in French as the Société d'investissement dans les transports de l'Ontario.
3. A corporation to be known in English as the Ontario Clean Water Agency and in French as the Agence ontarienne des eaux.

17.-(1) When ordered to do so by the Minister of Finance, a corporation shall pay into the Consolidated Revenue Fund such of its surplus funds as are determined by the Minister of Finance.

(2) In determining the amount payable under subsection (1), the Minister of Finance shall allow such reserves for the future needs of the corporation as he or she considers appropriate, and shall ensure that the payment ordered under subsection (1) will not impair the corporation's ability to pay its liabilities, to meet its obligations as they become due or to fulfil its contractual commitments.

(3) Despite the Financial Administration Act, the revenues and investments of a corporation do not form part of the Consolidated Revenue Fund.

30.-(1) Without limiting the powers or capacities of the Authority, its objects include,

- (a) assisting public bodies and the Province of Ontario to borrow and invest money, developing and carrying out financing programs, issuing securities, managing cash, currency and other financial risks, and providing such other financial services as are considered advantageous to the Province or and public body; and
- (b) operating, as agent for the Minister of Finance, either directly or through its authorized agents, offices as provided under the *Province of Ontario Savings Office Act* and regulations thereunder, and offering such services to the public as the Minister may direct.

From the *Financial Administration Act* (FAA):

Definitions

1. In this Act,

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“public money” means all money belonging to Ontario received or collected by the Minister of Finance or by any other public officer or by any person authorized to receive and collect such money and includes,

- (a) special funds of Ontario and the income and revenue therefrom,
- (b) revenues of Ontario,
- (c) money raised by way of loan by Ontario or received by Ontario through the issue and sale of securities, and
- (d) money paid to Ontario for a special purpose;

Public money to be deposited

2.—(1) Subject to this Part, all public money shall be deposited to the credit of the Minister of Finance.

Establishment of bank accounts

(2) The Minister of Finance shall establish in the name of the Minister of Finance, and may authorize an agency of the Crown to establish in the name of the agency, accounts with any bank, trust corporation, co-operative credit society, credit union, caisse populaire, credit union league or caisse populaire league that is designated by the Minister of Finance for the deposit of public money.

Duty of person collecting public money

(3) Every person who collects or receives public money shall pay all money coming into the person's hands to the credit of the Minister of Finance through such officers, banks or persons and in such manner as the Minister of Finance may direct, and shall keep a record of receipts and deposits thereof in such form and manner as the Minister of Finance may direct.

Exception

(4) Despite subsection (3), the Minister of Finance, on any conditions he or she considers appropriate, may in writing authorize a person who receives or collects public money to retain out of such public money all or any part of any amount owed by the Crown in right of Ontario to the person and payable from the Consolidated Revenue Fund.

Same

(5) An amount properly retained pursuant to an authorization under subsection (4) shall be deemed to have been received by and paid from the Consolidated

Revenue Fund in respect of the person to whom the authorization under subsection (4) was given.

Deposits in Province of Ontario Savings Offices

16.5—(1) Despite any Act or regulation, every ministry may deposit in any Province of Ontario Savings Office money held outside the Consolidated Revenue Fund and belonging to it or held by it in trust for the Crown.

Money raised a charge on Con. Rev. Fund

19. All money raised by way of loan and the interest thereon and the principal amount of an interest and premiums on all securities issued are a charge on and are payable out of the Consolidated Revenue Fund.

From the *Province of Ontario Savings Office Act* (POSO Act):

Powers of Minister to Borrow

1.(1) The Minister of Finance may borrow money by means of deposits in any amounts and from any person and may authorize any corporation incorporated as an agency of the Crown to open and operate offices for this purpose at such places in Ontario as the Minister may direct.

Corporation may appoint agents

(2) A corporation referred to in subsection (1) may appoint an agent to operate any office that it is authorized to open or operate under subsection (1).

Money subject to attachment

(3) Money deposited under this section is subject to attachment in the same manner as money deposited in a bank named in Schedule I or II to the *Bank Act* (Canada).

Expenses and revenues

(4) All expenses incurred in the administration of this Act shall be paid out of and all revenue paid into the Consolidated Revenue Fund.

2907-97-R United Brotherhood of Carpenters and Joiners of America, Local 3054, Applicant v. **Horizon Poultry Products Inc.**, Responding Party

Bargaining Unit - Certification - Employer operating poultry slaughtering and processing facility and employing 280 people at one location - Union applying to represent bargaining

unit of 15 employees working in one department - Twelve of fifteen employees voting in favour of union representation - Board affirming practice of not granting departmental bargaining units and seeing no reason to depart from that practice in this case - Application dismissed

BEFORE: *Russell G. Goodfellow*, Vice-Chair.

APPEARANCES: *Mike McCreary, Ken Fenwick, Jim Switzer* for the applicant; *Ted J. Kovacs, Cheryl Smith, Joe Helm, Jack Nolan* for the responding party.

DECISION OF THE BOARD; April 6, 1998

1. This is an application for certification.
2. The employer operates a poultry slaughtering and processing facility employing approximately 280 people at one location. The union has applied for a bargaining unit consisting of 15 employees working in one department. The bargaining unit is described as:

all Maintenance and Power Services Department employees of Horizon Poultry Products Inc. in the Township of Blanchard, save and except persons regularly employed for not more than 24 hours per week, casual employees, foremen and persons above the rank of foreman.
3. In response to the application, the employer took the position that, “there is no appropriate bargaining unit that isolates the group of 15 employees for which the Carpenters’ Union has applied”. Accordingly, a vote was held in the applicant’s proposed unit on November 13, 1997. Fifteen employees cast ballots. Twelve employees voted in favour of the applicant and three voted against it. Following the vote, the Board held a hearing to deal with the employer’s objection to the applicant’s proposed bargaining unit. The hearing took three days to complete. At the conclusion of the hearing, I reserved my decision. I now provide that decision.
4. In closing argument, counsel for the union took the position that the union would have an uphill battle in convincing me as to the appropriateness of its proposed bargaining unit if I were to approach the case with either of two pre-conceived notions: (1) that “bigger is better” even outside of the hospital industry; and (2) labour relations harm can be the subject matter of “speculation”. It was counsel’s submission that there is no presumption in favour of larger bargaining units outside of the hospital industry and that concrete evidence of serious labour relations problems is required before the Board will reject a proposed bargaining unit.
5. In my view, both of these assertions fall slightly wide of the mark. The real issue in this case is not a generalized presumption in favour of broader-based bargaining units (whether in the hospital sector or elsewhere), or whether the Board should engage in “speculation” about labour relations harm, but the Board’s long-standing and well understood practice of not certifying “classification-based” or “departmental” bargaining units. This is a practice that is not restricted to the hospital sector where, it was suggested, there tends to be a multiplicity of employee groupings, but applies more generally (see e.g. *Pepsi-Cola Canada Ltd.*, [1995] OLRB Rep. Aug. 1131 at para. 51; *Sifton Properties Limited*, [1993] OLRB Rep. Oct. 1010 at para 29; *Kidd Creek Mines Ltd.*, [1986] OLRB Rep. June 736; *T. Eaton Company Limited*, [1984] OLRB Rep. May 755; and *Lionhead Golf and Country Club*, [1996] OLRB Rep. Mar./Apr. 271). The decision in *Fort William Golf and Country Club Limited*, [1995] OLRB Rep. August 1070, upon which counsel placed much reliance, must be seen as something of an exception to this rule, resting on its own very unique set of facts.
6. In *Fort William* the department in question functioned almost entirely autonomously from the rest of the employer’s operation. The employees worked out of an entirely separate facility on the

employer's premises, at completely different hours of the day from other employees, with little or no interdependence of functions and with no interchange of personnel or activity. None of these things can be said here. Although we are obviously dealing with a question of degree, the level of distinctiveness between this proposed unit and the rest of the workforce is much less. The employees here work out of and throughout the same facility as employees in other departments, there is a substantial overlap in their hours of work, there is some interdependence of functions and there is some shared activity. While it is true that the persons included in the proposed bargaining unit all report to the same manager and that the manager is responsible for a departmental budget, even this seems quite different from the *Fort William* case. Here, there are not "two distinct lines of managerial authority" functioning essentially autonomously all the way to the top but several department or area managers all of whom report to the same plant manager. The manager of this department also appears to enjoy nothing like the kind of independent authority to hire, set wages and establish working conditions as was present in *Fort William*.

7. Having said all of that, there can be no doubt that there is a substantial "community of interest" between most of the employees working in this department. Indeed, among the majority of those employees the level of distinctiveness or "community of interest" may be greater than it is among employees in other departments. However, and for two reasons, that does not determine the matter. The first reason is theoretical. The second is factual. First, the Board has said repeatedly in recent years that the concept of "community of interest" is of little utility in resolving these issues. The level of "community of interest" necessary to demonstrate viability in the context of the *Sick Kids* test is truly minimal. It is a threshold which most proposed bargaining unit structures can clear. The real focus of the test is on the concept of "serious labour relations problems". (On this question, more will be said below.) Secondly, and even working within that concept, as a factual matter it is clear that there are communities of interest in this case that extend beyond the group in question. As alluded to earlier, there are employees in other departments who perform work within this department under the guidance of these employees. While it is true that such work is not in substantial quantity, it reveals another difficulty in segregating this employee complement from others for collective bargaining purposes. Moreover, some of the employees in this department (e.g. the stockroom person, the data entry clerk, the waste water treatment operator, and the knife sharpener) lack the qualifications, wage rates and certain other definable characteristics of the core group of licensed employees and, to that extent, appear somewhat anomalous.

8. I accept Mr. McCreary's suggestion that his client and the employer may well be able to resolve the issues of shared work or overlap in functions in constructive collective bargaining and that the differing "communities of interest" within this group may also be accommodated. However, that suggestion does not go far enough. There are other concerns. As noted in the case law referred to above, the Board's approach to determining bargaining unit appropriateness reveals a strong aversion to "fragmentation" or the creation of individual "islands" of employee groupings, each with their own terms and conditions of employment and potential collective bargaining agents. While it may well be the case that the remaining eight departments in this workplace do not share the same *level* of "community of interest" as the "Maintenance and Power Services Department" employees, such distinctions can become extremely fine. For the most part, and except in exceptional circumstances, they are not ones that the Board is prepared to make. Rather, the Board's focus is on "fragmentation" or the problems associated with carving up a single workplace into separate collective bargaining pods on the basis of varying degrees of distinctiveness. Unless there are good reasons for doing so (e.g. related to access to collective bargaining) the Board will generally not certify such groupings. On this point, and in addressing the applicant's concern about speculation, the Board can do no better than reproduce the following excerpts from *Sifton Properties Limited*, above, at para 29:

29. In many cases, the Board has underlined its reluctance to define bargaining units on the basis of employee classifications or employer departments because of the high potential for fragmentation in bargaining which that creates, as expressed in the following passage from *Kidd Creek Mines Ltd.*, [1986] OLRB Rep. July 736:

23. For many years the Board has been exceedingly reluctant to define bargaining units on the basis of employee classifications or employer departments, because of the high potential for fragmented bargaining which that creates (see, for example: *Cryovac Division, W. R. Grace & Co. of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General and Orthopaedic Hospital*, [1981] OLRB Rep. Nov. 1672; *University of Ottawa*, [1981] OLRB Rep. Feb. 232; and *Westeel-Roscoe Company Limited*, [1979] OLRB Rep. Nov. 1125). Even in the newspaper industry where departmental unionization has existed in the extreme (based initially upon craft distinctions which predated the current legislative framework), the Board has indicated that it might be less receptive to a continuation of these entrenched organizing patterns of the past, because computerized technology had revolutionized the structure and content of work in the newspaper business. (See *Hamilton Spectator*, [1981] OLRB Rep. Aug. 1177). Most recently, in *T. Eaton's Company Limited*, [1984] OLRB Rep. May 755 and *Simpson's Limited*, [1984] OLRB Rep. Sept. 1255, the Board reiterated its view that dividing an employer's business into bargaining units based upon departments would not be conducive to orderly collective bargaining. In *Eaton's*, for example, the Board refused to exclude a specialized department of computer salesmen from a broader "sales" bargaining unit, even though their skills, method of payment, and likely career opportunities were somewhat different from those of the other salesmen...

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25. Concerns about the consequences of fragmentation are not idle speculation, nor have they escaped attention in other jurisdictions. Because of the problems associated with the proliferation of bargaining units in industrial enterprises, the policy in a number of provinces has now shifted away from the recognition of craft units or other similar subdivisions of employees. Following the recommendations of the Woods Task Force in 1968, Parliament amended the *Canada Labour Code* to delete the provisions (similar to section 6(3)) protecting craft bargaining units, and the circumstances in which an existing unit can be splintered are now closely confined (see *Feed-Wright Limited*, [1979] 1 Can. LRBR 296; *Atomic Energy of Canada Ltd.* (1978), 1 Can. LRBR 92; and *Cablevision Nationale Ltée* (1979), 3 Can. LRBR 267 and cases referred to therein). In British Columbia, craft units can be certified only if they are "otherwise appropriate" for collective bargaining, and the British Columbia Labour Relations Board has shown a marked disinclination to endorse craft bargaining units in a manufacturing context. Even in the construction industry where craft unionism reigns supreme, the Ontario Legislature has intruded. In 1978, the Legislature imposed a system of province-wide bargaining by trade in place of the fragmented system of employer by employer bargaining which existed before. There is now a developing consensus that orderly collective bargaining is not enhanced by fragmenting an employer's work force into a number of competing bargaining units (for a thoughtful analysis of the issues see Paul C. Weiler: *Reconcilable Differences: New Directions in Canadian Labour Law*, Carswell's 1980 at pp. 151-178). Finally, since this Board may not have the power to later consolidate or rationalize the bargaining structure (as the Federal and B.C. labour boards can do), we should be particularly careful in fashioning the bargaining unit in the first place.

The Board has departed from that approach on the agreement of the parties and in particular situations of historical anomaly, or in light of the history of a particular sector, acceding to requests for classification-specific bargaining units in some cases. As well, where the applicant has been able to show difficulties with access to bargaining, particularly in situations where the respondent was in effect asking the union to organize more than one work site, the Board has balanced the interests of the parties, giving particular weight to the organizing interests of the employees and certified unusual bargaining units. However, it has never done so lightly, or without a particular reason to do so.

9. The Board's practice of not granting departmental or classification-based bargaining units is grounded in its industrial relations expertise and in its superintending function. The Board is entitled to draw on its experience in fulfilling this role and in establishing such practices. That is part of the reason why the Board is a Board and not a court. In this area, the Board's practice is well known. It is found in the case law set out above. Problems of fragmentation are not restricted to those identified by Mr. McCreary but are legion in the Board's case law. The reference to the requirement of "concrete demonstrable problems which will result from the applicant's proposed bargaining unit" noted in such cases as *Active Mold Plastic Products Ltd.* [1994] OLRB Rep. June 617, is meant to *shift the focus away from arguments concerning differing communities of interest*. It is not meant to suggest that the applicant gets the unit that it applies for no matter how that unit is defined and it is certainly not meant to suggest that fragmentation and departmental bargaining units are not problematic. While the Board must always be alive to the possibility of exceptions, for the reasons already given this case is not one of them.

10. Finally, I would observe that there is a significant value to be derived from certainty in this area. Parties understand the way in which organizing must be conducted and govern their affairs accordingly. Funds are not expended, employee expectations are not raised, and scarce public resources are not drawn down in pursuit of collective bargaining structures which are unlikely to pass muster. Despite counsel's best efforts to distinguish this case from the substantial body of law in this area, it falls within the general principle outlined above.

11. Accordingly, the application is dismissed.

2627-97-R Brewery, General and Professional Workers' Union, Applicant v. International Brotherhood of Electrical Workers, Local 353, Responding Party

Bargaining Unit - Certification - Applicant seeking to represent bargaining unit of business representatives employed by IBEW - IBEW asserting that bargaining unit should include general labour/maintenance workers - Board finding bargaining unit proposed by IBEW appropriate and that unit proposed by applicant not appropriate - IBEW seeking to remove four names from voters list prepared by it - Applicant objecting on grounds of "gerrymandering" and asserting that IBEW should not be permitted to change position after viewing Form A-4 - Board permitting IBEW to challenge the status of the four individuals where the IBEW's change in position was asserted prior to holding of the vote and preparation of the Officer's certification worksheet

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

APPEARANCES: *John McNamee* and *Bill Robinson* for the applicant; *Joseph Liberman* and *Joe Fashion* for the responding party.

DECISION OF RUSSELL G. GOODFELLOW, VICE-CHAIR AND BOARD MEMBER J. A. RUNDLE; April 30, 1998

1. This is an application for certification.

2. A representation vote was held on October 30, 1997. There were 25 names on the voters' list. Twenty-two people voted. The ballots of 16 voters were segregated. No ballots were counted. The

parties disagree on the appropriateness of the applicant's proposed bargaining unit. They also disagree on the list of employees to be included in the unit. These matters were listed for hearing.

3. Also listed for hearing was a request by the applicant to amend its proposed bargaining unit description. That request had been made prior to the decision directing the vote but it was not addressed in the vote decision. At the hearing before us, the employer submitted that the Board should not permit the amendment.

4. After hearing the parties' arguments on the appropriateness and amendment issues, the Board ruled (in truly bottom-line fashion) that the bargaining unit description would be the one sought by the employer (subject to the resolution of two other outstanding issues as to the appropriate level of managerial exclusion) and not the one sought by the applicant in its amendment. In so doing, and in giving no reasons for its decision, the Board left it unclear in the parties' minds whether the basis for its decision was a refusal to permit the requested amendment or a finding that the amended bargaining unit was inappropriate in any event. The effect of this ruling was to bring into the unit several employees and, therefore, to create the possibility of counting their ballots.

5. When this decision did not produce any agreement between the parties as to the counting of ballots, the Board proceeded to hear the parties' submissions on a third issue - a motion by the applicant that the employer ought not to be allowed to change its position, expressed in the list of employees filed in its response, as to the inclusion of four individuals in its proposed bargaining unit.

6. The Board reserved its decision on this issue. We now provide that decision together with our reasons for the earlier bargaining unit description ruling.

Decision on the employer's "change in position"

7. Prior to the vote, the employer sought to remove four names from its original list of employees set out in Schedule A to its response. The employer raised these challenges or possible amendments to its list with the Labour Relations Officer prior to the holding of the vote. Before us, the employer asserted that in raising these challenges or seeking to make these amendments it was merely responding to positions taken by the applicant as to the employee status of three individuals whose names the employer had placed on its original list. Specifically, the employer took the position that if the union was challenging the employment status of two individuals because of their relationship with a third party, then two other individuals whose names it had placed on the original list should be so treated as well. According to the employer, the two additional employees stood in precisely the same legal position as the two employees sought to be excluded by the union. With respect to two further employees, the employer asserted that they perform essentially the same functions, for purposes of the Act, as does an employee whom the applicant claims is managerial.

8. It was the position of the applicant that the Board ought to exercise its discretion, in effect as the master of its certification procedure, to preclude what it characterized as an obvious attempt at "gerrymandering". The gist of the applicant's argument was that the employer's change in position was not the product of anything the applicant did in response to the original list but the employer's own review of the Form A-4 (which was received prior to the vote) and, presumably, its assessment as to how employees were likely to vote. Relying essentially on pre-Bill 7 case law, the applicant attempted to draw a parallel between the receipt by the employer of the Form A-4 and the giving of the count in the former card-based certification system. Under that system, once the count was given, the Board would generally not allow parties to change their positions as to which employees were in or out of the bargaining unit. In the words of the Board in *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618, this policy was intended to ensure that certification hearings would not become "endless meanderings

without map or compass, each turn in the journey being dictated by changing perceptions of the parties as to what best serves their own interests”.

9. Unfortunately, the applicant’s argument pays insufficient heed to the fact that the former card-based certification system has been replaced by a vote-based one in which no count is given until the ballots have been tabulated. Thus, while under the former system the guide to the subsequent litigation was established immediately prior to the giving of the count (see e.g. *Santa Maria Foods*, above, at para. 8), under the current system it is found in the report prepared by the Labour Relations Officer at or immediately prior to the holding of the vote. The significance of the Officer’s Report to defining the scope of the subsequent litigation was recently dealt with in *Martha’s Garden Inc.*, [1997] OLRB Sept./Oct. 891 at 897-898, where the Board put the matter this way:

26. The issue which arises now is in what circumstances and to what extent ought the parties to be permitted to abandon or alter the positions they have staked out prior to the taking of the vote. The question is reminiscent of the one dealt with at the outset of this decision. If the parties were irrevocably bound to their pre-vote positions, then every pre-vote disagreement might have to be litigated. That would hardly be a healthy or productive climate for this Board to foster. On the other hand, if parties are permitted to change positions or raise new issues any number of times and at any stage in the process, the finality of litigation would be nothing more than an empty hope. As a general rule, just as agreements between the parties are final, so too should the Officer’s report prepared in advance of or concurrent with the taking of the vote be seen as *the* roadmap to the litigation, if any, which will follow the vote (at least insofar as it pertains to bargaining unit or list issues).

[emphasis in original]

10. Implicit in this decision is the understanding that, absent agreement and prior to the preparation of the Officer’s Report, parties will have an opportunity to examine their positions and may need to adjust them in light of new information, including positions advanced by the other party. While the Board would hope that such “jockeying for position” will be kept to a minimum, it is likely an inevitable feature of a five-day vote-based system. To vary the metaphor only somewhat, it is not something over which the Board will be prepared to closely “ride herd”. That level of supervision will apply following the preparation and execution of the Report.

11. Obviously, the timing of the employer’s change in position in this case (which was prior to the holding of the vote and the preparation of the certification worksheet) does not offend this principle. Nor, in our view, can it be said to have prejudiced the applicant. The Board does not accept the applicant’s assertion that the employer’s conduct may have had a chilling effect on employees’ voting intentions or that the applicant relied to its detriment on the employer’s original list in structuring its pre-vote campaigning. This is not a 600-person bargaining unit and the employer is not seeking to add names to the list but to delete them. We cannot see how the employer’s change in position can be said to have prejudiced the applicant in any way.

12. It is also important to bear in mind that what the applicant is asking the Board to do is to rule that four employees who may not, in fact, be properly part of the bargaining unit should nevertheless have their ballots counted. This too is a significant consideration.

13. For all of these reasons, the applicant’s motion to deny the employer the opportunity to have the status of Messrs. Martindale, Venning, Nahirney and Robinson determined on the evidence is dismissed.

Reasons for the earlier bargaining unit description decision

14. The original bargaining unit description sought by the applicant was:

all employees of the Respondent, save and except Business Manager, persons above the rank of Business Manager, persons covered by an existing collective agreement and persons regularly employed for not more than 24 hours per week.

15. The bargaining unit description set out in the employer's response was:

all employees of the Responding Party, save and except business manager, persons above the rank of business manager, President of the Executive Committee, persons covered by an existing Collective Agreement and persons regularly employed for not more than 24 hours per week, in the Municipality of Metropolitan Toronto.

16. Subsequent to the filing of the response, the applicant wrote to the Board identifying certain challenges it wished to make to the employer's list of employees and seeking to amend its original bargaining unit description so that it would read:

all employees of the Responding Party, save and except business manager, *office manager, persons above the rank of office manager or business manager, persons employed as general labour/maintenance*, persons covered by an existing Collective Agreement, and persons regularly employed for not more than 24 hours per week.

(applicant's emphasis)

17. Apparently through inadvertence, the Board did not address the applicant's request at the time that it was made and directed the vote based on the applicant's original bargaining unit description. At the hearing, the parties agreed that we could leave aside the issue of the appropriate level of managerial exclusion and determine: (a) whether the applicant's requested amendment to exclude "persons employed as general labour/maintenance" should be allowed; and/or (b) whether a unit that would exclude "persons employed as general labour/maintenance" was appropriate.

18. As indicated, the majority ruled that the general labour/maintenance employees would not be excluded from the bargaining unit. The basis for the ruling was that a unit that would exclude "persons employed as general labour/maintenance" was not appropriate.

19. The parties placed before the Board an agreed statement of facts concerning the duties and responsibilities of persons employed in the general labour/maintenance category and their relationship to the employer and other employees. Counsel for both sides then supplemented this statement with certain additional factual representations that are not material to our decision.

20. In the circumstances, the Board sees no need to reproduce the agreed facts or to record the parties' arguments at all. In determining whether a particular bargaining unit is appropriate the Board must consider not only whether there is a sufficient community of interest for the employees to bargain together in a viable way (a requirement which the Board has repeatedly said lacks significant content) but whether the particular configuration of employees sought to be represented would cause the employer any serious labour relations problems. (Indeed, it is this latter inquiry which has become the focus of the test.) In this case, while it was clear that a unit of employees that would either include or exclude the general labour/maintenance employees (only five or six in number) would meet the first branch of the test, the majority was of the view that to exclude them would fail the second branch and raise other labour relations concerns.

21. In the majority's view, the points of contact between the disputed employees and the rest of the bargaining unit are sufficient to enable the employees to bargain together in a viable way and will not result, as the applicant would suggest, in two completely different sets of terms and conditions of employment. These commonalities include membership in the same union/employer, work performed at or out of the same location, vertical integration of some workplace activities, and payment out of the

same ultimate source. On the other hand, and despite the differences that do exist (and to be fair to the applicant there were many, e.g. the purposefully short-term nature of the employment, the payment of hourly vs. salaried wages out of different funds, and the absence of any significant “horizontal” integration of work functions) to have excluded the general labour/maintenance employees would have given rise to (a) unnecessary and, in the circumstances, undue fragmentation of the workplace; and/or (b) the equally troubling prospect that this remaining rump of employees would, as a practical matter, be forever denied the opportunity to obtain collective representation.

22. There are only 40 (or so) employees in this workplace, of whom approximately 14 are already represented by another trade union in an office and clerical bargaining unit. To add a second trade union which represented all remaining employees *except* those employed in a single category or classification would give rise to the competing and equally undesirable possibilities of a third bargaining unit and bargaining agent being added to the workplace mix or that the remaining grouping would be too small to attract the attention of another union. Weighed against these possibilities was the desire of the applicant to represent, in the end, what amounts to little more than a classification-based or, perhaps, departmental bargaining unit consisting essentially of business representatives. This, too, is a practice upon which the Board’s case law has frowned and provides an additional reason for our finding that this aspect of the bargaining unit description proposed in the amendment was not appropriate.

23. In the result, the majority finds that the applicant must take the remaining workforce as it finds it. Any concerns that we might have about the strength of the interests held in common between the group of employees that the applicant seeks to represent and the general labour/maintenance employees it wishes to exclude are outweighed by these competing concerns.

24. For these reasons, the majority considers the exclusion of the general/labour maintenance employees to be inappropriate and, therefore, ruled as it did. In view of this decision, we also found it unnecessary to address the further question of whether the applicant was entitled to amend its proposed bargaining unit description prior to the decision directing the vote.

25. The matter will be re-listed for hearing.

DECISION OF BOARD MEMBER H. PEACOCK; April 30, 1998

1. I dissent in respect of the inclusion of the general labour/maintenance category of employment in the bargaining unit.

2. I find it totally inappropriate that dues-paying members of the respondent employer trade union employed for relatively short periods of time primarily to top up hours needed to establish Employment Insurance credits should be included for collective bargaining purposes along side the business representatives of the employer that the applicant seeks to represent. There is no community of interest between the two groups. Their eligibility as local union members on the dispatch list in obtaining additional non-trade hours places the so called general labour/maintenance group closer in interest to the employer than to the applicant. In the parlance of the not for profit sector, they are numbered among the “owners” to whom this employer is accountable. There is no on-going labour relations concern. The conditions of the general labour/maintenance group are governed by rates found in the Principal Construction Agreement when assigned to work within the local union facilities that they would be paid as journeymen referred by the local in the usual manner. They are not paid out of the general payroll fund of the local union, but out of various trust funds for education and building maintenance.

3. In my view, the agreed facts referred to in paragraph 20, demonstrate clearly the gulf between the interests of the unit of business representatives sought by the Brewery Workers’ Union and

the interests of the local union members temporarily employed in the general labour/maintenance group.

4. Accordingly, I would grant the applicant's request to amend its proposed bargaining unit and find the amended description excluding the general labour/maintenance group to be appropriate.
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4353-93-G Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America, Applicant v. **J & D Display & Interiors Ltd.**, Responding Party

Abandonment - Bargaining Rights - Construction Industry - Construction Industry Grievance - Voluntary Recognition - Board not accepting employer's submission that voluntary recognition agreement signed by employer in 1976 did not grant bargaining rights to Carpenters' union - Board reviewing its approach to abandonment in ICI sector of the construction industry and noting that bargaining rights abandoned in ICI sector only where Board finds that every affiliated bargaining agent and the employee bargaining agency have all abandoned bargaining rights - Small amount of employer activity between December 1976 and March 1978 not leading to conclusion that bargaining rights abandoned prior to March 1978 - After March 1978 Board finding no actions (or lack of action) by any of the affiliated bargaining agents (outside Board Area #8) or by the employee bargaining agency which would support finding of abandonment - Board finding that Carpenters' union still holding bargaining rights with respect to employer and that collective agreement continuing to apply

BEFORE: *Robert Herman*, Alternate Chair.

APPEARANCES: *Mike McCreary* and *George Joyce* for the applicant; *Ted J. Kovacs* and *Joseph Klement* for the responding party.

DECISION OF THE BOARD; March 10, 1998

1. This is a referral of a grievance to the Board pursuant to section 133 of the *Labour Relations Act, 1995* (the "Act").
2. When the Board began its hearings in this matter, it sat as a panel. As a result of the death of one of the Board Members on the panel, the hearing continued before me alone.
3. The responding party, J & D Display & Interiors Ltd. ("J & D"), asserts that the applicant, Carpenters Local 27 ("Local 27"), has never held bargaining rights for the employees of J & D, and that J & D has never been and is not now bound to any collective agreement with the applicant. Alternatively, J & D asserts that if it was bound to a collective agreement at any time, bargaining rights have since been abandoned by the applicant. In the further alternative, if the Board concludes that J & D remains bound to the collective agreement, the employer asserts that the applicant is estopped from obtaining any remedy from the Board.
4. This application raises again the approach taken by the Board in considering whether abandonment has occurred in the industrial, commercial and institutional ("ICI") sector of the construction industry, and more specifically, whether the Board ought to look only to the actions of the local union (more accurately, the affiliated bargaining agent) in the Board areas where the responding party has been working, or whether the Board ought also to consider the conduct of affiliated bargaining

agents having jurisdiction elsewhere in the province, in Board Areas where the responding employer has not been engaged in construction activity.

5. The instant decision deals only with whether the applicant ever acquired bargaining rights for J & D, and if so, whether those bargaining rights have since been abandoned. Depending on the answer to these questions, this application is to be relisted for hearing to deal with the question of estoppel.

Facts

6. J & D was set up in 1964, and is a company which engages in a variety of store renovation, carpentry, and display work. It demolishes or dismantles current in-store fixtures and structures, and/or does the necessary construction work to build or renovate stores or buildings, including both the outside facades or presentations and all inside structures and displays. Most of the work involved is carpentry work, work which would be covered by the Carpenters' Provincial ICI Agreement.

7. J & D's president is Joseph Klement. He established the company in 1964, and has been its chief executive officer throughout.

8. Prior to 1976, J & D was not unionized, and had had no interaction with the applicant. Late in that year, J & D was hired to work on the job of dismantling the inside displays of the former Eatons' store at College Street and Yonge Street, in Toronto, and to transfer some of the dismantled shelving and other fixtures to the new Eatons' store then being built in the Toronto Eaton Centre. The contract called for J & D to then reassemble and install the transplanted displays at the new store.

9. Unlike the College Street Eatons' store, the Toronto Eaton Centre was a unionized project, and in order to perform the site preparation, reassembly and installation at that location, J & D had to use unionized carpenters. To obtain these unionized carpenters, Klement went to Local 27's union hall. He spoke there with Matthew Whelan, a business agent for Local 27 at the time, and requested that the union send men to the Toronto Eaton Centre to work for J & D.

10. Local 27 required Klement to sign three documents, as a condition of referring the men. On December 2, 1976 Klement signed a voluntary recognition agreement, which picked up the existing Carpenters' collective agreement, running from August 28, 1975 to October 31, 1977. This collective agreement covered ICI work in Board Area #8. The agreement signed by Klement was between J & D and the Carpenters' District Council of Toronto and Vicinity (the "Carpenters' Council"), on behalf of Local 27 and other named locals of the United Carpenters. The agreement noted the accreditation of the General Contractors Section of the Toronto Construction Association as the bargaining agent for all employers of carpenters and carpenters' apprentices for whom the union had bargaining rights in Board Area #8 in the ICI sector, and it stated that the parties were agreed that the employer recognized the union as bargaining agent for all carpenters and carpenters' apprentices engaged in the Board Area. In the agreement, the employer and the union acknowledged and agreed that as of its effective date, they were bound by all the terms and conditions and provisions of the stipulated collective agreement.

11. The second document signed by Klement on December 2, 1976 was an agreement between J & D and the Carpenters' Council by which J & D named the employees covered by the voluntary recognition agreement who were working in the bargaining unit as of December 2nd. The third document he signed was a Participation Agreement with the Trustees of the various Carpenter benefit plans, by which J & D agreed to make the appropriate contributions to the pension, welfare, and vacation plans as required by the collective agreement. Copies of all three documents were provided to Klement.

12. Klement testified that he never agreed to be bound by the Carpenters' collective agreement, nor had he ever agreed to grant bargaining rights to the Carpenters. He testified that he never understood that J & D had in fact become bound by the signing of these documents, and that he had only gone to the union to ask it to provide unionized carpenters to the company for the couple of weeks necessary to complete the reassembly of the dismantled units at the Toronto Eaton Centre. He signed the documents, he testified, as the union required him to do so in order to send the union carpenters for that purpose. He signed in order to get these carpenters for a few weeks, not to become bound to any collective agreement.

13. Local 27 did provide union carpenters to J & D for the work at the Toronto Eaton Centre. Four carpenters were dispatched to J & D for work at that site, and they worked there a total of three and a half to four weeks, sometime in late December, 1976 or early 1977. They were paid by the company according to the terms and conditions of the collective agreement, and remittances and contributions were made as required by the collective agreement. When their work was finished there, they stopped working for J & D.

14. Meanwhile, Local 27 had forwarded the three documents signed by Klement on December 2, 1976 to the Toronto Construction Association. The General Contractors Section of that Association had been since 1973 accredited under the Act to represent all contractors signatory to the Carpenters ICI collective agreement covering Board Area #8. The General Contractors Section was explicitly referred to, in the voluntary recognition agreement signed by Klement on December 2, 1976, as the accredited bargaining agent for all employers bound to the collective agreement.

15. Upon receipt of the three documents from Local 27, the General Contractors Section recorded in its files that J & D was now an employer which it represented. Sometime within the first few months of 1977, the General Contractors Section began forwarding to J & D various information and material on a regular basis. The first letter it sent to J & D stated that J & D was now "automatically bound to the collective agreement".

16. A subsequent collective agreement was entered into between the General Contractors Section and the Carpenters' Council, covering the period from November 1, 1977 to October 31, 1978. During this period, pursuant to amendments to the Act, the current scheme of provincial bargaining for carpenters (amongst other unions) for the ICI sector of the construction industry was introduced. By designation issued under the Act by the Minister on March 3, 1978, the General Contractors Section, referred to as the Labour Relations Bureau of Ontario General Contractors Association, became part of the designated Employer Bargaining Agency for contractors engaged in carpentry, and previously bound to the various carpenters' ICI collective agreements. The Employer Bargaining Agency now had statutory authority to bargain provincial agreements for the employers who would be bound to the provincial agreement. This included J & D. The first Carpenters' Provincial ICI Agreement negotiated by the Employer and Employee Bargaining Agencies for carpenters ran from September 6, 1978 to April 30, 1980. By operation of law, the previous ICI collective agreement for Board Area #8 became nullified by and replaced by this first provincial agreement.

17. Pursuant to the Act, every two years thereafter, new collective agreements were entered into by the Employer Bargaining Agency and the Employee Bargaining Agency, and in accordance with more recent amendments to the Act, every three years.

18. Throughout the period from late December, 1976 or early 1977, to date, the General Contractors Association has continued to send regular mailings to J & D. J & D has remained listed in its records as an employer it represents and as an employer bound by the collective agreement it helps to negotiate. Any cursory perusal of these mailings would have made clear to J & D that the company

was being treated by the General Contractors Association as an employer bound to the Carpenters' collective agreement. Klement testified he threw away these mailings, and never read them.

19. In contrast to the efforts made regularly by the General Contractors Association to keep J & D apprised of matters, from the time the Toronto Eaton Centre job was completed until 16 years later in 1993, the union had no contact with J & D whatsoever. It made no visits to J & D's offices, it forwarded no mailings to J & D, it filed no grievances. Even though its members had been dispatched to J & D in December, 1976 or January, 1977, when they stopped working for the company several weeks later, Local 27 did not check whether J & D was still engaged in ICI carpentry work. J & D's business office was listed in the phone book, and Local 27 must have been aware of the company, having only months before signed up J & D. Yet Local 27 took no action to investigate or verify whether J & D was still doing carpentry work in Board Area #8.

20. Nor did Local 27 check its own records as to whether it had bargaining rights with J & D. Had it bothered to do so, it would have immediately realized that J & D was bound to the collective agreement. It would also have noted, in the records of the benefit plan trustees, that J & D had not filed any notice that it was dormant and no longer engaged in construction activity. Thus, both the records of Local 27 and the benefit plans would have indicated that J & D was bound to a collective agreement with the Carpenters, and that the company was still active.

21. What was J & D's construction activity between 1976 and 1993? During the portion of this period prior to the imposition of the province-wide scheme, it appears as if J & D was engaged in six jobs, only five of which took place in Board Area #8. The first two of these were the dismantling of the College Street Eatons' store and the installation work at the Toronto Eaton Centre, the jobs with respect to which Klement signed the voluntary recognition agreement. The remaining three jobs were visible enough that it would have been apparent to passers-by that J & D was working on site.

22. After March, 1978, and continuing regularly since then, J & D has employed from three to eight carpenters at any time, on literally hundreds of construction projects, most of which included significant amounts of carpentry work. Most of these jobs were in the Toronto area, but there were a few projects in other relatively nearby locations, such as Hamilton, London, Oshawa and Huntsville. Although many of these jobs were working in Eatons' stores, where a tarpaulin would have blocked off viewing of the area in which the men were working, and where J & D was not allowed to post a sign indicating that it was working on site, many of the jobs were at other locations where J & D always put up large signs advertising its presence on site. These non-Eatons' jobs were both small and large, some lasting many months, and J & D signs would often be posted or placed on main thoroughfares, at the front of the store being renovated or on the hoarding surrounding or blocking off the front of the store. Much of the work on these jobs was carpentry work, covered by the applicable collective agreements, and this would have been apparent to anyone looking at the project.

23. Local 27 led evidence that it was not in fact aware of any of these jobs, and I accept that evidence, but it can only be through an indifferent attitude and approach or something akin to wilful blindness that Local 27 could have remained in this state of ignorance. Local 27 clearly ought to have known of the company's activities, and it ought to have known J & D continued to operate. The company had an office listed in the phone book, and a large sign posted at its business premises. Even if Local 27 had not passed by any of the hundreds of project sites, it had only to open the phone book to find the company. Throughout this interval, the company did not apply the collective agreement or remit any funds to the union.

24. Then, in December, 1993 the applicant filed an application for certification for carpenters and carpenters' apprentices, naming J & D as the responding employer. Local 27 had discovered that J & D was employing carpenters, and believed that the company was not yet unionized. Only after

filing its certification application did Local 27 look at its own records, and it discovered that J & D was already bound to an agreement with it, bargaining rights having been obtained some 17 years earlier. The applicant then filed a grievance against J & D, and subsequently the instant application under section 133. The application for certification was then adjourned *sine die*, pending a decision in the instant application.

Decision

25. The first question for the Board is whether Local 27 acquired bargaining rights on December 2, 1976, when Klement, on behalf of J & D, signed a voluntary recognition agreement. The responding employer asserts that it never became bound, having believed at the time that it was only agreeing to apply the collective agreement for the period during which it needed union members for four weeks or so, to work at the Toronto Eaton Centre.

26. There is no question that J & D agreed to be bound by the collective agreement on December 2, 1976, and that J & D did thereby become bound. The documents signed by Klement are clear and unambiguous, and explicitly note the legal effect of signing them. Even if there were *viva voce* evidence clearly suggesting otherwise, which there is not, I would give no weight to that evidence, in the face of the voluntary recognition agreement, in which the parties' intention is clearly and unambiguously stated. By signing that document, J & D granted bargaining rights and agreed to be bound, and did immediately become bound to the collective agreement.

27. Where a document is so clear, extrinsic *viva voce* evidence proffered to suggest a different meaning for the document ought not to be considered. In *Steds Limited*, [1992] OLRB Rep. Jan. 67, the Board wrote as follows:

101. Notwithstanding counsel's able argument, I do not agree. In the face of the clear and unambiguous terms of the collective agreement signed by a duly authorized representative of the employer, the Board cannot simply assume that the evidence of William Olmsted is either necessary, relevant or admissible. To tread down the path which counsel for Steds urges upon the Board in this instance would undermine the certainty of written agreements entered into by duly authorized representatives of parties. If the argument were accepted, contracting parties could no longer simply rely upon documents executed years ago unless the signatories to the agreement were available to testify that the document truly means and was intended to mean what it says.

102. A board of arbitration cannot simply admit extrinsic *viva voce* evidence which seeks to contradict, vary or add to the written terms of a collective agreement. The parties' intentions must be ascertained from the written words they have used. In addition, boards of arbitration don't generally inquire into the reasons why a collective agreement was signed. It is only in cases where the language of the agreement is ambiguous (patently or latently) that extrinsic evidence is admissible. Evidence of statements or conduct during negotiations or at the time of signing the agreement is not generally admissible. If such evidence is not admissible in any event, Steds cannot be prejudiced by its inability at this stage to call the evidence. In my view Steds' arguments with respect to delay and prejudice in the presentation of its case do not apply to the issue as to whether Local 607 acquired and held bargaining rights.

28. As to whether Klement believed that he had not agreed to be bound by the collective agreement and had not become bound, it is unnecessary to decide. I do find, however, that Local 27 did not represent that J & D would not be bound when Klement signed the three documents, and I note again that the documents are clear and unambiguous on their face.

29. The effect of signing the voluntary recognition agreement in December, 1976, was that J & D became immediately bound to the then applicable collective agreement, and the General Contractors Section of the Toronto Construction Association immediately acquired the right and obligation to represent J & D: see, for example, *Eagle Mountain Contracting Limited*, [1981] OLRB Rep. Apr. 442.

The General Contractors Section remained entitled to and required to represent J & D when it entered the subsequent collective agreement, covering the period from November, 1977 to October, 1978, and with the issuance of the designation in March, 1978, J & D became represented by the employer bargaining agency for the ICI sector, and became bound to the first provincial agreement entered into pursuant to the province-wide scheme for the ICI sector. In this respect, see sections 156 and 157 of the Act, and *Newman Bros. Limited*, [1981] OLRB Rep. June 750; *Culliton Brothers Limited*, [1982] OLRB Rep. Mar. 357 at paragraphs 19 and 20; and *Ellis-Don Limited*, [1992] OLRB Rep. Feb. 147, at paragraphs 38 and 39.

30. Unless it can be said, therefore, that Local 27 has abandoned its bargaining rights with J & D, J & D remains bound to the currently applicable collective agreement.

31. In addressing this issue, it is important to keep in mind that when the Board considers whether there has been abandonment subsequent to March 1978, any such abandonment would have occurred in the ICI sector, a sector characterized by a provincial agreement and province-wide bargaining rights. Under the statutory scheme for the ICI sector, bargaining rights are held by and enforceable by each affiliated bargaining agent across the province; that is, by each bargaining agent designated by the Minister to be represented in bargaining by the employee bargaining agency for its trade. For virtually all trades that have more than one affiliated bargaining agency in the province, the province has been divided by the parent union into geographical areas (not necessarily contiguous with the Board Areas), and each affiliated bargaining agent has jurisdiction in a particular area. Yet each of them have bargaining rights for all contractors bound by the agreement, regardless of whether they operate in a locale within the jurisdiction of the particular affiliated bargaining agent. Any analysis of abandonment in the ICI sector must take place in the context of this province-wide scheme and the geographically distinct jurisdictions of the affiliated bargaining agents, and the interwoven, shared and province-wide bargaining rights they all enjoy.

32. The Board's approach to abandonment in the ICI sector is now fairly well established. In *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405, the Board wrote as follows:

14. The concept of abandonment is well established in the Board's jurisprudence. See, for example, *Hugh Murray Limited*, [1979] OLRB Rep. July 664, in which the Board wrote, in part, as follows:

10. At the hearing counsel for the union contended that the Board had no jurisdiction to conclude that the union had lost its bargaining rights through abandonment. With this we are unable to agree. Although unions generally obtain and lose bargaining rights through the certification and termination procedures set forth in the Act, the Board has long recognized that bargaining rights may also be acquired through the voluntary recognition of a union by an employer, and lost through the voluntary abandonment of those rights by a trade union. Apparently the first case where the Board concluded that a union had abandoned its bargaining rights was *Guelph Cartage Co.* 55 CLLC ¶18,018. In that case a union which had been certified in August 1948 did not serve a notice to bargain on the employer until July of 1955. When the matter came before the Board, the Board ruled that since the union had "slept on its rights" for seven years it could not now call upon the employer to enter into negotiations. A summary of the type of situations where the Board has applied the principle of abandonment since that first case is set out as follows in the *J.S. Mechanical* case, [1979] OLRB Rep. Feb. 110:

Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the

appointment of a Conciliation Officer under section 15 of the Act (see *Cooks-ville Sheet Metal*, [1974] OLRB Rep. June 365; *John Entwistel Construction Limited*, [1972] OLRB Rep. Oct. 919; *Elgin Construction Co. Limited*, [1969] OLRB Rep. April 134; *Guelph Cartage Company*, 55 CLLC ¶18,018). As well, if a union has abandoned its bargaining rights it may be precluded from relying on them either to bar another agreement that renews itself automatically (see *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *O. & W. Electronics Limited*, [1970] OLRB Rep. Jan. 1213; *Architectural Acoustics & Drywall*, [1970] OLRB Rep. Feb. 1408; *N. W. Clayton Sheetmetal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69), or to require an employer to bargain by giving notice to bargain under such an agreement (see *Rainee Manufacturing Products Limited*, [1967] OLRB Rep. Nov. 796). A union's abandonment might also obviate the necessity for the Board to determine the merits of a termination application (see *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379; *Northern Engineers & Supply Co. Limited*, [1968] OLRB Rep. Oct. 731; *Barrie Tanning Limited*, [1966] OLRB Rep. May 128).

An application for judicial review of that (and another) decision was dismissed in *Re Carpenters' District Council and Hugh Murray (1974) Ltd.* (1980), 33 O.R. (2d) 670, in which the Divisional Court confirmed that it is within the Board's jurisdiction to determine whether or not a trade union has abandoned bargaining rights which it obtained by means of certification (or voluntary recognition).

15. Counsel for the respondent sought to rely upon *Hugh Murray* as an example of bargaining rights being abandoned by a trade union in the context of the province-wide bargaining provisions of the Act. However, it is clear from the Board's decision in that case that the Board found that the abandonment had occurred *prior* to the onset of province-wide bargaining; in paragraph 9 of that decision, the Board wrote as follows:

When all of the evidence is considered we are satisfied that although the act continued the union's bargaining rights and allowed it to serve notice to bargain on *Hugh Murray (1974) Limited*, for reasons of its own the union chose not to do so, but rather at all times acted as though it did not have bargaining rights for the company's employees. On these facts we can only conclude that the union voluntarily abandoned, or gave up, its bargaining rights, and that it did so prior to the designation of the employee and employer bargaining agencies by the Minister of Labour in March of 1978.

16. In *J.S. Mechanical*, [1979] OLRB Rep. Feb. 110, the Board listed some of the factors which it has generally found to be of assistance in deciding whether or not an abandonment of bargaining rights has occurred:

5. In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights.

33. It is worth emphasizing that it is statutory provisions which establish and structure the ICI sector, and regulate in certain respects the legal rights enjoyed by participants in this sector. It is this statutory scheme which has led the Board to view abandonment issues arising in this sector from a different perspective. As the Board said in *Culliton Brothers Limited*, (above):

18. While the respondent states that it is arguing the abandonment of bargaining rights, in our view, such an argument is not tenable. The Board characterizes the argument of the respondent as the abandonment of collective agreements, which unknown to the applicant, the respondent, Local 47, and the Group were applicable to them at various times and places. These collective agreements

came into effect and were applicable to employers and trade unions beyond the immediate parties to the collective agreements by virtue of provisions of a public statute known as the *Labour Relations Act*. The application of these collective agreements under the provisions of the *Labour Relations Act* to the applicant, the respondent, Local 47 and the Group arose independently of their awareness by virtue of the operation of law. In these circumstances, the Board is not prepared to find that there has been an abandonment of bargaining rights or collective agreements.

19. As the Board noted earlier, the collective agreement between Local 47 and the MCAO expired on April 30, 1977. A new collective agreement between the same parties was made on May 20, 1977, and came into effect on May 1, 1977, with an expiration date of April 30, 1978. The respondent was once again bound by the terms of this collective agreement with respect to the geographic area set forth in the bargaining unit in the certificate of the Board in the industrial, commercial and institutional sector and residential sector of the construction industry. The amendments contained in *The Labour Relations Amendment Act, 1977*, S.O. 1977, c.31 (often referred to as Bill 22) introduced the concept of province-wide bargaining and province-wide collective agreement between employer bargaining agencies and employee bargaining agencies in the industrial, commercial and institutional sector of the construction industry. In an employer bargaining agency designation dated March 21, 1978, made pursuant to section 127(1)(b) [now section 139(1)(b)], the Minister of Labour designated the Group as the employer bargaining agency to represent in bargaining all employers whose employees were represented by certain affiliated bargaining agents (including Local 47). In an employee bargaining agency designation dated April 12, 1978, made pursuant to section 127(1)(a) [now section 139(1)(a)], the Minister of Labour designated the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference consisting, *inter alia*, of Local 47, as the employee bargaining agency to represent in bargaining all journeymen and apprentice sheet metal workers, sheeters, sheeters' assistants and material handlers represented by certain affiliated bargaining agents (including Local 47 and the applicant).

20. Province-wide collective agreements were entered into with respect to the industrial, commercial and institutional sector of the construction industry between the employee bargaining agency and the employer bargaining agency referred to in the preceding paragraph. The first collective agreement was effective from May 29, 1978, until April 30, 1980. The second collective agreement became effective from May 1, 1980, until April 30, 1982. However, this second collective agreement became effective on the date that *The Labour Relations Amendment Act, 1979* (No. 2) S.O. 1979, c. 113 (often referred to as Bill 204) came into effect. One of the effects of this amendment is now to be found in section 137(2) of the Act which provides:

Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purposes of the collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

The respondent is represented by a designated employer bargaining agency and is deemed to have recognized all of the affiliated bargaining agents represented by a designated employee bargaining agency as the bargaining agents for the purposes of collective bargaining in their respective geographic jurisdictions in respect of the employees of the respondent employed in the industrial, commercial or institutional sector of the construction industry. It is through the series of steps referred to in this paragraph and paragraphs 16, 17, 18, 19 and 20 that the respondent is bound by the province-wide collective agreement which became effective from May 1, 1980, and which remains in effect until April 30, 1982.

34. In *Lorne's Electric*, (above) the Board wrote:

21. Having regard to all of the circumstances, we find as a fact that there has been no abandonment of the ICI sector bargaining rights granted to Local 586 by the Board's certificate of January 5, 1977, and subsequently vested in the Employee Bargaining Agency (for the purpose of conducting

bargaining and concluding a provincial agreement) by the combined legal effect of section 142 of the Act and the aforementioned employee bargaining agency designation dated December 12, 1977. In reaching this conclusion, we are not unmindful of the fact that the Union has not, prior to 1987, sought to enforce or administer the provincial agreement vis-a-vis the respondent. As indicated in *J.S. Mechanical, supra*, one of the factors which the Board has generally considered in cases involving allegations of abandonment of bargaining rights is "whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement". Where a trade union that has years earlier negotiated a collective agreement, which purports to have automatically renewed itself without any further bargaining (by virtue of a renewal provision), seeks to belatedly negotiate a new collective agreement or to raise the old collective agreement as a bar to a second trade union's application for certification, the fact that the first trade union has not for a number of years sought to enforce or administer the collective agreement by means of its grievance and arbitration provisions is clearly a pertinent factor to be considered in determining whether that trade union has in fact abandoned its bargaining rights. However, that factor is of little or no assistance in determining whether an abandonment of bargaining rights has occurred in the context of ICI sector province-wide bargaining, where the party which by law holds the bargaining rights for purposes of conducting collective bargaining and entering into a provincial agreement (i.e., the employee bargaining agency) is not the party which administers the provincial agreement at the local level. The Act's bifurcation of bargaining and administration of the provincial agreement renders an affiliated bargaining agent's failure to administer the provincial agreement vis-a-vis an employer of little or no consequence in determining whether the employee bargaining agency has abandoned its bargaining rights in respect of the employees of that employer. Even if the two-year period between rounds of province-wide bargaining were a sufficiently lengthy interval to warrant the drawing of an inference that a particular affiliated bargaining agent had abandoned the provincial agreement vis-a-vis a particular employer in its geographic jurisdiction (which, in our view, it is not), that would not preclude other affiliated bargaining agents from enforcing the provincial agreement vis-a-vis that employer in their respective geographic areas. Moreover, when the next round of province-wide bargaining occurred, the employee bargaining agency would be able to rely upon the "deemed recognition" provisions set forth in section 137(2) of the Act to assert that the employer was, for the purposes of the new round of bargaining, deemed to have recognized all of the affiliated bargaining agents represented by it, including that particular affiliated bargaining agent.

35. It is in this context that the Board assesses whether there has been abandonment in the ICI sector. In *G.S. Wark Limited*, [1996] OLRB Rep. Sept./Oct. 811, the Board commented on this as follows:

11. Whether a trade union has abandoned bargaining rights is a question of fact which stands to be determined on the facts surrounding the issue in each particular case. Among the factors which the Board considers in determining an issue of abandonment are the length and degree of the trade union's inactivity, whether the trade union has attempted to negotiate or renew a collective agreement, whether terms and conditions of employment have been altered without the agreement or objection from the trade union, and the trade union's explanation for its conduct (or lack thereof). The quality of a trade union's representation will not, as such, be a relevant consideration, except to the extent that it may suggest abandonment. For example, complete inactivity and a refusal to respond to employee complaints indicates a poor quality of representation which may, in the context of the circumstances as a whole, and in the absence of a satisfactory explanation from the trade union, indicate abandonment.

12. It is true, as Local 1 asserts, that the onus is on the parties asserting abandonment to establish it, and that the presumption is that trade unions do not voluntarily abandon bargaining rights (*Ellis-Don Limited*, [1992] OLRB Rep. Feb. 147; application for judicial review dismissed [1995] OLRB Rep. Dec. 1506, Ontario Court of Justice (General Division), Divisional Court).

13. Notwithstanding the language used in some Board decisions, we respectfully suggest that it is inaccurate to say that "clear and cogent" evidence is required to establish abandonment, at least in the sense suggested by Local 1. First of all, the Board's factual determinations are always made on the balance of probabilities, while "clear and cogent", as argued by Local 1, suggests some higher test. Second, a common feature of abandonment cases is a less than satisfactory evidentiary foundation. It is not unusual, as in the case herein, for abandonment cases to deal with long periods

of time for which there is little documentary evidence and where witnesses are either unavailable or have a very poor recollection of events. Many abandonment cases have to be determined on the basis of inferences drawn from bits of documentary or other evidence which is available. Accordingly, what constitutes evidence of abandonment, and what evidence is sufficient to rebut the presumption against abandonment, will depend on the circumstances. Further, since the operative presumption is clearly rebuttable, the onus can shift to the trade union to explain its conduct (as it does when it comes to a consideration of automatic collective agreement renewal clauses, for example - see below).

14. Similarly, although a trade union's "intent" with respect to bargaining rights is a factor which the Board will consider, this intent must be discerned from the objective facts, and the reasonable inferences which can be drawn from those facts. The weight which is given to a trade union's subjective *ex post facto* expression of intent at a hearing when abandonment is raised will depend on the circumstances, but it will generally be given little weight unless there is something in the evidence before the Board which supports it, and it will not necessarily be determinative in any event.

15. Further, cases which involve the province-wide bargaining scheme in the ICI sector in the construction industry present particular difficulties. Many such cases, including this one, involve periods of time which both precede and follow the introduction of province-wide bargaining in 1978. At the very least, the Board will consider post-provincial bargaining conduct insofar as it may give an indication of whether the bargaining rights in issue were or were not abandoned prior to the introduction of provincial bargaining (*Marineland of Canada Inc.*, [1990] OLRB Rep. Dec. 1298). This does not mean that post-provincial bargaining conduct cannot be the basis for a finding of abandonment and it seems that a further clarification may be necessary in that respect.

16. It has been suggested that the Board's decisions in *Culliton Brothers Limited*, [1982] OLRB Rep. March 357 and *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405 stand for the proposition that provincial bargaining rights in the ICI sector cannot be abandoned. We respectfully disagree. *In neither of those decisions did the Board say that the principle of abandonment does not apply to the province-wide bargaining scheme and provincial collective agreements in the ICI sector of the construction industry. (Nor is it impossible for there to be abandonment of ICI bargaining rights. Consider the admittedly extreme example of an employee bargaining agency, having the actual authority to do so, writing to an employer expressly stating that it and all of its affiliated bargaining agents are abandoning their ICI bargaining rights with respect to that employer.) Those decisions do no more than suggest that it is more difficult to establish abandonment in such circumstances because of the way bargaining rights are distributed under the Act, and the way that provincial agreements operate in the ICI sector. Further, to the extent that either of these decisions, or others, suggest that the conduct of an employee bargaining agency or an affiliated bargaining agent cannot weigh against other affiliated bargaining agents (or the employee bargaining agency, which in any case is always also an affiliated bargaining agent) for the purpose of determining whether bargaining rights have been abandoned, we also respectfully disagree. It will not necessarily be the case that the conduct of one trade union entity will weigh against another related trade union entity in that respect, but it is not obvious why that could never be the case. Indeed, the conduct of other affiliated bargaining agents, or the employee bargaining agency, which have had an opportunity to exercise bargaining rights may be symptomatic of abandonment, or not, as the case may be.*

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19. The Board rejects Local 1's submission that the agreement of the parties that Local 1 never intended to abandon the bargaining rights in issue is determinative of the abandonment issue. "Intent" is a fundamental part of the principle of abandonment, and it is inherent in the principle that a finding of abandonment depends upon a finding that the trade union intended to abandon its bargaining rights. But the intent which is important is the union's objective intent as demonstrated by its conduct during the relevant time period, and not its subjective intent as expressed after the fact when the union is responding to an assertion that it has abandoned its bargaining rights. That is, the question is: when viewed objectively, does the trade union's conduct demonstrate an intention to abandon bargaining rights?

[emphasis added]

36. Relying upon the statements of the Board in paragraph 16 from *G.S. Wark*, set out immediately above, counsel for the employer argues that the Board ought only to consider the actions (or lack thereof) between Local 27 and J & D for the period in question, in order to determine whether bargaining rights have been abandoned. The fact that affiliated bargaining agents representing members in Board Areas where the company was not engaged in any construction activity have done nothing to indicate abandonment or an intention to abandon is both unnecessary and irrelevant, the employer submits, since only those Board areas in which construction activity took place merit consideration by the Board.

37. The argument asserted by the employer appears grounded on two theories or propositions: first, that the statutorily mandated delegation of authority to the provincial employee and employer bargaining agencies is a delegation solely for the purposes of bargaining, and therefore activity of the employee bargaining agency occurring outside the context of negotiations or bargaining need not be considered, and second, that in determining whether abandonment has occurred, the Board need only consider the circumstances or conduct that took place in the particular Board Areas where the responding party has been engaged in work, or has been operating its business.

38. In *Toronto Dominion Bank*, [1995] OLRB Rep. May 686, the employer there raised the same argument:

32. Counsel argued that the negotiation of a collective agreement, or “collective bargaining narrowly construed” was only *one* of the factors to which the Board looks in determining the issue of abandonment. That factor is the *only* factor affected by the scheme of province-wide bargaining. The fact that under the province-wide scheme, collective agreement *negotiations* rested with another agency (the EBA’s) does not however mean that the many other factual inquiries which the Board undertakes to assess whether abandonment has occurred have become irrelevant. Rather, the *negotiation* of a collective agreement which takes place as a result of the statute must be assessed and balanced together with all other facts and circumstances when making a factual determination of whether there has been an abandonment of bargaining rights. It was counsel’s position that neither the statutory provisions themselves, nor any compelling policy reasons dictated that the mere arrival of province-wide bargaining in 1978 rendered the concept of abandonment obsolete in the ICI sector of the construction industry.

33. With respect to the statutory provisions, counsel submitted that the Act sets up a province-wide designation system and establishes a scheme pursuant to which a single provincial agreement is negotiated by the EBAs for all constituent employers and local unions (ABAs) in the province. Nothing in those provisions bars the Board from concluding that a particular local or all locals have abandoned bargaining rights. Indeed the opposite was said to be true.

34. Section 139(2) reads as follows:

139.-(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents *for the purpose of collective bargaining in their respective geographic jurisdictions* in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry, referred to in the definition of “sector” in section 119, except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

[emphasis added]

Although that section deems an employer to have recognized all of the ABAs represented by the employee bargaining agency, on its express wording that recognition is *limited* and is only “for the purpose of collective bargaining in their respective geographic jurisdictions”.

35. Similarly, section 144 of the Act states:

144. Where an employee bargaining agency has been designated under section 141 or certified under section 142 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but *only for the purpose of conducting bargaining and*, subject to the ratification procedures of the employee bargaining agency, *concluding a provincial agreement*.

[emphasis added]

Thus, although this section vests all of the rights, duties and obligations of the local unions (ABAs) in the employee bargaining agency, it does so for the *limited* purpose of “conducting bargaining and ... concluding a provincial agreement”. The only “bargaining rights” enjoyed by the EBA’s are bargaining rights “narrowly construed” ie. the right to negotiate a provincial agreement.

36. Under the statutory provisions, the more “broadly construed bargaining rights”, the right, responsibility and obligation to *represent* employees and actively promote and enforce their rights with respect to employers, are *not* transferred to the employee bargaining agency but continue to reside with the ABA or local union. As the right, responsibility and obligation to represent employees and to administer and to enforce a provincial agreement insofar as a particular employer is concerned continue to reside with the ABA or local union, the conduct of that ABA or local union (or where more than one geographic jurisdiction is involved *those* ABAs or local unions) continues to be relevant in assessing whether abandonment has occurred in much the same way as that conduct was considered prior to the advent of the statutory provisions relating to province-wide bargaining.

37. Counsel submitted that to the extent that the Board has suggested in its decisions (see *Lorne’s Electric*, [1987] OLRB Rep. Nov. 1405 and *Culliton Brothers’ Limited*, [1982] OLRB Rep. Mar. 357) that abandonment cannot occur after the statutory scheme of province-wide bargaining was enacted, the Board has erroneously focused *only* on bargaining rights “narrowly construed” ie. the negotiation of a provincial collective agreement, and has not properly considered the more broadly based “bargaining rights” which include the entitlement and obligation to represent employees working for an employer. He argued that there are no legal or rational policy impediments to the Board considering the conduct of local union(s) or local ABA(s) in determining the factual question of abandonment. The mere scheme of province-wide *bargaining* for a provincial collective agreement does not grant bargaining rights in perpetuity notwithstanding a fifteen year period of inactivity by local union(s) or ABA(s).

39. And see, *Marineland of Canada Limited*, [1990] OLRB Rep. Dec. 1298 (at paragraphs 10 to 12), where the Board also noted this argument, but found it unnecessary to deal with it in light of its decision on other grounds that bargaining rights had been abandoned prior to the advent of provincial bargaining.

40. The Board has specifically rejected on a number of occasions the second proposition, that the only conduct the Board ought to consider in assessing whether abandonment in the ICI sector has occurred is conduct of the affiliated bargaining agent(s) with jurisdiction in Board areas where construction activity by the responding party has occurred: see *Steds* (above), at paragraph 106, and *Hudson’s Bay Company*, [1993] OLRB Rep. June 563, at paragraph 41 (to give but two examples).

41. With respect to the first proposition, it is not accurate to say that the delegation of authority of bargaining rights to the Employee Bargaining Agency in the ICI sector describes the only legal rights enjoyed by the Employee Bargaining Agency. Its rights are not limited to the negotiation and conclusion of a provincial agreement, nor are the rights of the affiliated bargaining agents limited to events occurring within their geographical jurisdictions. The Act grants statutory powers to the employee and employer bargaining agencies which enable them to fulfil roles which cannot readily be described as solely of a “bargaining” nature. These entities are granted the legal authority to seek to ensure that all players in the provincial scheme abide by it.

42. Under the statutory provisions, bargaining authority is transferred from local unions or contractors to their respective employee or employer bargaining agencies (see sections 156 and 157 of the Act). These two bargaining agencies are required to negotiate one provincial agreement for each provincial unit (a grouping of the affiliated bargaining agents of one trade, represented by the employee bargaining agency: see section 162 of the Act). Pursuant to section 144(3) of the Act, any interested person, trade union (which includes all the affiliated bargaining agents) or the employee bargaining agency itself, is authorized to seek to enforce the provincial agreement, and the conduct that takes place while that agreement is in effect. The employee bargaining agency can thus challenge the attempts of any affiliated bargaining agent and contractor to make an arrangement inconsistent with the provincial agreement. The employee bargaining agency has therefore a continuing role in the administration and enforcement of the provincial agreement it has negotiated, not limited in purpose or function to bargaining behaviour. See, also, sections 162(2) and 163(2) in this respect.

43. All parties bound by the provincial agreement are also entitled to participate in all arbitrations arising thereunder. If there is a dispute over the interpretation, application, administration, or alleged violation of the provincial agreement during its term, pursuant to section 163(3) of the Act, the employee bargaining agency, the employer bargaining agency, and the affiliated bargaining agents are all considered to be parties for purposes of section 133, the section under which any grievance can be referred to the Board for arbitration. The employee and employer bargaining agencies and each affiliated bargaining agent across the province are statutorily recognized as having a continuing interest in all grievances under their provincial agreement, regardless of whether they are the grieving party.

44. When the full scope of the structure and functioning of the ICI sector scheme is considered, it is extremely difficult to maintain that the employee bargaining agencies' role is limited to bargaining, or that the affiliated bargaining agents representing members in Board Areas where a contractor has not been actively working have no valid and legal interest in the work of that contractor. These affiliated bargaining agents do have continuing enforceable legal rights, as does the employee bargaining agency, with respect to the activities of contractors working anywhere in the province in the ICI sector. This is not to suggest that an affiliated bargaining agent has an obligation to enforce its rights in a particular case, and no doubt, an affiliated bargaining agent having jurisdiction in (for example) Thunder Bay will have little interest in work done by a contractor in Toronto, or seek to enforce the provincial agreement with respect to that work. However, it will certainly have a continuing interest in any work done within its jurisdiction, or for which it can assert a claim. Inaction by an affiliated bargaining agent does not readily support an inference of abandonment where it had no opportunity to exert its rights, and in any event, no reason to do so.

45. The statements made by the Board in paragraph 16 of *G.S. Wark* (above) must be read in this context. I agree with the comments made by the Board there in paragraph 16, that "to the extent that either of these decisions, or others, suggest that the conduct of an employee bargaining agency or an affiliated bargaining agent cannot weigh against other affiliated bargaining agents (or the employee bargaining agency, which in any case is always also an affiliated bargaining agent) for the purpose of determining whether bargaining rights have been abandoned, we also respectfully disagree." Certainly, the conduct of the employee bargaining agency, authorized by statute to represent the affiliated bargaining agents in certain respects, can be held against the affiliated bargaining agents, as can the conduct of an individual affiliated bargaining agent. In the latter case, however, an individual affiliated bargaining agent is not authorized, by law at least, to speak on behalf of other affiliated bargaining agents with respect to their jointly held bargaining rights. In practice, an affiliated bargaining agent might become so authorized. This possibility is in part why the Board has noted so many times that, even in the ICI sector, abandonment is a question of fact. Nevertheless, for the Board to conclude that bargaining rights in the ICI sector have been abandoned, the Board must find that every affiliated bargaining agent and the employee bargaining agency have all abandoned bargaining rights.

46. Any finding of abandonment not premised on such a finding would be inconsistent, as a matter of law, with the provincial ICI scheme. To adopt a test or approach that only assesses the conduct of particular affiliated bargaining agents, but not all of them, would serve to override the provincial scheme in the ICI sector. It could also potentially undermine that scheme. For example, if the Board only considered the actions of the affiliated bargaining agent in the Board Area(s) where a contractor had been working, in considering whether abandonment had occurred, the affiliated bargaining agent and the contractor could arguably enter into a local arrangement which would otherwise be unlawful as an arrangement inconsistent with the provincial agreement. Through the device of a locally engineered abandonment of bargaining rights, the two local parties could agree to terms and conditions contrary to the provincial agreement, and after the work was performed under this local arrangement, the contractor could voluntarily recognize the union. While this scenario may be unlikely, it illustrates the inappropriateness of focusing only on local behaviour.

47. One example of where abandonment could occur in the ICI sector is provided at paragraph 16 of *G.S. Wark*: the employee bargaining agency, authorized to speak on behalf of all its affiliated bargaining agents, acts in a manner that indicates that it and all the affiliated bargaining agents have abandoned their bargaining rights with a particular contractor. There are no doubt other hypothetical examples, but for any of them, if any affiliated bargaining agent cannot be said to have exhibited evidence of abandonment itself, through its own actions (or inaction) or through the actions (or inaction) of an agent authorized to represent it for this purpose, there cannot as a matter of law be abandonment in the ICI sector. This is the necessary effect of the statutory scheme.

48. With these comments in mind, the Board turns now to the facts, and a consideration of whether the bargaining rights here have been abandoned, whether prior to the onset of the provincial scheme, or if not, whether subsequent to that time.

49. The considerations just discussed about finding abandonment in the ICI sector do not apply, of course, if bargaining rights were abandoned prior to the onset of the ICI scheme: see, for example, *Marineland* (above) in this respect. Between the acquisition of bargaining rights on December 2, 1976, and the designation issuing on March 3, 1978, at which time the province-wide scheme became effective and applicable to the parties, J & D was only engaged in a few projects in the ICI sector in Board Area #8. The first jobs were the projects involving both the College Street and Toronto Eaton Centre, Eatons' stores which were the very projects on which bargaining rights were acquired. These projects cannot therefore support any finding of abandonment.

50. There were only three jobs which would have been covered by Local 27's collective agreement which were performed by J & D between December, 1976, and March, 1978. Such a relatively small amount of employer activity over such a relatively short period does not lead to a conclusion that Local 27 intended to or did abandon its bargaining rights prior to March 3, 1978. This sort of limited construction work would not create the visibility and presence which, for example, was created by the building of a 300 foot high, 30 acre, manmade mountain in *Marineland* (above), a mountain being built almost on the doorstep of the then business agent for the union.

51. While Local 27 would have known that J & D was in business, having dispatched men to it for the Toronto Eaton Centre job, its failure to contact J & D after that project is reflective of inattention, not abandonment. A union is not expected to be aware of each and every job or project engaged in by a contractor in a particular Board Area, and its failure to actively pursue contractors over a relatively short period suggests perhaps indifference or lack of resources. To require a union to monitor or investigate in these circumstances, failing which bargaining rights would be nullified, would be impractical and unrealistic. The failure to contact J & D again or to discover the projects in question

here cannot be taken to indicate any intention to abandon bargaining rights. Bargaining rights were not abandoned prior to March 3, 1978.

52. After that date, there were few projects outside Board Area #8, and in any event, no projects in the majority of other Board Areas. There were no actions (or lack of action) by any of the affiliated bargaining agents in those Board Areas, or by the Employee Bargaining Agency, which would support any finding of abandonment.

53. The Board therefore concludes that Local 27 has not abandoned its bargaining rights, and that it continues to hold such bargaining rights with respect to J & D. The collective agreement therefore continues to apply.

54. The questions of whether there has been a breach (although if the collective agreement applies, as the Board has now ruled it does, the answer would seem axiomatic) and the appropriate remedy, if any, remain. The estoppel argument has not yet been fully considered by the Board. This matter will be relisted at the request of either party, to deal with the question of estoppel, and any other outstanding matter.

55. To assist the parties in resolving the matters remaining, there appears to be a reasonable argument for applying the principles of estoppel to the facts at hand. It does not appear as if Local 27 has been sufficiently diligent in exercising its rights, and its conduct might have led the responding employer to conclude that the collective agreement would not be applied by the applicant to its construction activity.

56. In any event, these issues can be fully canvassed if the application proceeds.

2489-97-JD United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663, Applicant v. **Kel-Gor Limited** and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128, Responding Parties

Construction Industry - Jurisdictional Dispute - UA and Boilermakers' union disputing assignment of certain work, including fabrication, installation, testing and welding, in connection with skid units, cold boxes, convection boxes of oil heaters, heat exchangers and vessels weighing three tons or less, piping and tubing in connection with fabrication of furnace or heater units, and tubing connected with fabrication of polyurethane reactors - Employer operating as contractor in construction industry and also operating permanent manufacturing and fabrication shop - Employer bound to both UA's and Boilermakers' provincial collective agreements in ICI sector, and to shop fabricating agreement with Boilermakers' union - Employer also having practice of applying UA provincial agreement to work performed by UA members in employer's shop - Board satisfied that disputed work not construction work and that UA does not have collective agreement covering work in dispute - Board finding that disputed work properly assigned by employer to Boilermakers' union

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. G. Knight* and *G. McMenemy*.

APPEARANCES: *Laurence C. Arnold* and *Robert Humphreys* for the applicant; *Bruce Binning* and *Ron Gordon* for Kel-Gor Limited; *David McKee* and *Jim Tinney* for International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128.

DECISION OF THE BOARD; April 24, 1998

1. This is a jurisdictional dispute complaint proceeding under section 99 of the *Labour Relations Act, 1995*. When a complaint concerning an assignment of work is filed under this provision, the Board is not required to hold a hearing (subsection 99(3)) and may make any interim or final order the Board considers appropriate after consulting with the parties (subsection 99(5)). A consultation need not include an appearance before the Board, although the Board generally does afford such an opportunity to the parties. In this case, in addition to requiring the parties to submit the usual briefs, the Board convened a consultation on March 12, 1998 in order to hear from the parties orally.

2. No one requested a formal hearing, or an opportunity to call evidence, either generally or with respect to a particular issue. No one suggested that the Board should not or could not dispose of this complaint on the basis of the written materials and what was said at the consultation. Further, the Board considers it appropriate to do so.

3. This is not a “typical” jurisdictional dispute, in the sense that it involves a consideration of construction industry and non-construction industry concerns, and the interface between the two.

4. There are several specific items which constitute the work in dispute in this complaint:

- (1) The fabrication, installation and testing of piping and supports for skid units and cold boxes for which a “UA label” is not required.
- (2) All work on convection boxes of oil heaters for which a “UA label” is not required.
- (3) The off-loading, handling and installation of heat exchangers and vessels weighing three tons or less in relation to cold boxes and skid units.
- (4) The welding and installation of piping and tubing in connection with the fabrication of furnace or heater units.
- (5) The welding and installation of tubing connected with the fabrication of polyurethane reactors.

The UA claims all the work described in points 1, 2 and 3, the installation work described in points 4 and 5, and half of the welding work described in points 4 and 5. In this case, there is no dispute concerning the assignment of “UA label” fabrication work.

5. Kel-Gor is a Sarnia based contractor which operates in the construction industry and also has a permanent manufacturing and fabrication shop. In recent years, Kel-Gor has become a manufacturer of cold boxes and skid units.

6. Cold boxes and skid units compress gases into liquid form. Gas enters at one end, passes through a system of heat exchangers, vessels and pipes, and exits under pressure as a liquid. The base or frame and supports which rise from the base to the other components of such units are made of structural steel. Heat exchangers cool and liquefy the gases, vessels store compressed gases or liquids, and the gases and liquids travel through the system in the piping. A skid unit stands unshielded. A cold box is a skid unit with a gas tight exterior “skin”. This outer membrane serves to protect a unit which will be exposed to the elements, or it can provide an envelope for insulation or inner gases which can be used to facilitate the process. Cold boxes and skid units are between 30 and 120 feet long, and are generally 12 feet high by 12 feet wide.

7. The heat exchangers used in cold boxes and skid units manufactured by Kel-Gor are fabricated elsewhere, but are installed by Kel-Gor in its permanent shop. Vessels may or may not be fabricated by Kel-Gor. The pipe used in the system is fabricated by UA members at Kel-Gor. The rest of the unit, to the extent that it is not included in the work in dispute, is fabricated by members of the Boilermakers employed by Kel-Gor under a fabricating shop agreement.

8. There is a five year history behind the dispute concerning the assignment of the work in issue. This history demonstrates the futility of attempting a Solomonian division of work jurisdiction in an attempt to placate trade unions which are competing for work.

9. The UA points to this history and asserts that there is an estoppel, waiver or acquiescence which operates to preclude the Boilermakers from disputing the UA's right to have the work in dispute assigned to members of the UA. The UA asserts that nothing the Boilermakers have done, including a June 10, 1997 letter the Boilermakers sent to Kel-Gor, has ended the estoppel, waiver or acquiescence.

10. It is interesting that the UA could not decide whether what it was asserting was an estoppel, waiver or acquiescence. In any case, assuming that the concepts of estoppel or waiver can apply to jurisdictional dispute complaints, the Board is not satisfied that either has been made out. In essence, these equitable principles operate to limit the ability of a party which has relinquished a contractual right it has against another party, or a statutory right which can be relinquished, to reassert that legal right. In this case, there is no contractual relationship between the UA and the Boilermakers which could give rise to an estoppel, and there is no statutory estoppel. Nor have the constituent elements of either estoppel or waiver otherwise been made out.

11. Acquiescence is a similar equitable principle, and equally does not apply, except to the extent that it might be said that the Boilermakers have acquiesced to the UA's jurisdictional claim in this case by agreeing to it by its conduct. As will become apparent below, the Board is not persuaded that that is the case.

12. Kel-Gor is bound to both the UA's and the Boilermakers' provincial collective agreements in the industrial, commercial and institutional sector of the construction industry in Ontario. The Boilermakers also have a "shop fabricating agreement" with Kel-Gor.

13. Both unions' ICI agreements are "provincial agreements" within the meaning of subsection 151(1) of the *Labour Relations Act, 1995*. This provision is in the "province-wide bargaining" section of the "construction industry" part of the Act, and it defines a provincial agreement as: "provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126.

14. *Prima facie*, such collective agreements are construction collective agreements. Although the UA's provincial agreement does purport to cover work which is not construction industry work, its general orientation is nevertheless to the construction industry. Further, the UA's provincial agreement includes the following provisions:

ARTICLE 1 - DEFINITIONS

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1.3 "Contractor" means an employer performing Mechanical work in the Industrial, Commercial, and Institutional Sector of the Construction Industry under the terms of this Collective Agreement and any successor or assign.

ARTICLE 2 - RECOGNITION

2.1 The Association agrees to recognize the Council as the sole collective bargaining agent for all employees of the Contractors as defined in Definition 1.8.

2.2 The Council agrees to recognize the Association as the sole collective bargaining agent for all Contractors as defined in Definition 1.3

ARTICLE 9 - TRADE OR WORK JURISDICTION

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9.3 Subject to the conditions in Clause 9.1 and 9.2 above, and subject to jurisdictional Agreements between the trades, decisions of record, and local area practice, this Agreement covers the unloading, distribution and hoisting of all equipment and piping for plumbing and/or pipe fitting systems, and the fabrication, installation and handling of all plumbing pipe fitting and industrial process control systems including all hangers and supports. Without limiting the generality of the foregoing, this agreement covers the installation of new piping systems and related equipment, the maintenance and repair of all piping systems and related equipment, and the removal and/or relocation of all piping systems and related equipment for the purpose of renovation, retrofit, reconstruction, replacement or relocation. Piping systems and related equipment includes, but is not limited to that contained in the following types of work: Water Treatment Plants, Water Pumping Stations, Waste Disposal Plants, Sewage Treatment Plants, Energy from Waste Projects, Solar Heating Systems, Co-Generation Plants and Non-Utility Generating Stations. Where no work claim dispute exists, the original assignment of the above works shall be to the United Association. The Association, at its discretion, will cooperate with the Union in maintaining the historical jurisdiction of the United Association as may be threatened by other sources attempting to destroy the work opportunities for the Employers and the Union. Refer to Appendix A page 200 regarding "Letter of Understanding".

ARTICLE 24 - FABRICATION

24.1 All piping machines, whether power or manually operated, which are required to perform piping fabrication work on the job or [at the] Contractor's fabrication location, shall be operated by members of the Union. All pipe work installed by the contractor on the job site shall be cut and fabricated by members of the Union. Contractors who fabricate piping off the job site shall register the fabrication location off site with the Union and shall employ members of the Union to perform the work under the terms and conditions of this agreement. The above shall not be deemed to include regular items of self-contained packaged equipment, with associated integral piping normally listed in manufacturers' catalogues. All piping 2" and under shall be fabricated in the jurisdiction of the Local Union where the work is to be installed.

24.2 Where the word "shop" is used in this section it shall be defined as a shop under agreement with the United Association or one of its Local Unions in the Province of Ontario.

24.3 Contractors who will be fabricating in a shop outside of the Union jurisdiction wherein the fabricated materials are to be installed must comply with the following, prior to commencing fabrication (regular Union label shops need not comply with this requirement):

“Notify Business Managers of Business Agents for the Union, in writing, on the company letterhead, where fabricating and where fabricated materials are to be installed”.

24.4 Both the Union and employer acknowledge that exceptions may arise where the employer is required to install equipment such as skid mounted vessels, pumps, driers, exchangers, etc. Prior to commencement of this work, where the employer is required to install such components and if the matter cannot be mutually resolved between the employer and the union, it shall be immediately referred to the Provincial Joint Advisory Board for an immediate solution.

24.5 Item one and two are not intended for use in comfort heating and plumbing.

24.6 Subject to existing jurisdictional agreement between trades, decisions of record, or established area practice, all brackets, hangers and pipe supports that are not specifically itemized and listed in a standard manufacturer’s catalogue, are to be fabricated by members of the Union.

*Refer to Appendix A page 199 regarding “Letters of Understanding”

15. It is not unusual for construction trade unions and employers to apply the terms and conditions of a provincial agreement to off-site fabrication work, whether performed in a “shop” or manufacturing facility operated by the employer or elsewhere. However, while it may be open to a construction trade union and an employer to agree that the employer is bound to apply a provincial agreement to off-site fabrication work performed in the employer’s shop, the mere fact that a trade union and an employer agree to apply the terms and conditions of a provincial agreement to such work as a matter of convenience does not confer bargaining rights in that respect (*Ecodyne Limited*, [1979] OLRB Rep. July 629).

16. Accordingly, the mere fact that Kel-Gor has applied the UA provincial agreement in its fabrication shop, whether to the performance of UA label work or otherwise, does not necessarily mean that the UA can rely on that agreement as establishing bargaining rights which form a basis for its claim to the work in dispute in this case. To the extent that the UA and Kel-Gor have been content to apply the UA’s provincial agreement to the work performed by UA members in Kel-Gor’s shop, each reaps the benefits and takes the risks associated with doing so rather than entering into a shop or fabrication agreement, as the Boilermakers and Kel-Gor have.

17. Upon reviewing the UA’s provincial agreement, and particularly the provisions set out above, it is apparent that it is intended to apply to and to define bargaining rights in the construction industry. Although the “purpose and intent” preamble is quite general, it does refer to “the industry”. This suggests the question: which industry? Article 1.1 reiterates that the employer party to the provincial agreement is the Mechanical Contractors’ Association Ontario. This employer organization is the employer bargaining agency designated by the Minister under what is now section 153 of the Act to be the UA’s collective bargaining partner in the ICI sector of the construction industry in Ontario. For the purposes of provincial bargaining and as the designated employer bargaining agency, the Mechanical Contractors Association Ontario’s *raison d’être* is to represent employers for whom UA affiliated bargaining agents have bargaining rights in the ICI sector of the construction industry. (We note that the MCAO predates provincial bargaining, and continues to have interests outside of that scheme.)

18. For purposes of the provincial agreement, Article 1.3 provides a limiting definition of “contractor”; namely, an employer performing “mechanical” work in the ICI sector; that is, construction work.

19. Similarly, Article 2 limits bargaining rights under the UA provincial agreement to employees of employers in the ICI sector of the construction industry.

20. As its title indicates, Article 9 identifies the “trade or work jurisdiction” of the UA provincial agreement. Article 9.3 is the “guts” of this provision, and while it does contain the work “maintenance” (which is not construction work) within its twenty lines of text, it is clearly directed to construction work. In the context of Article 24, the word “fabrication” is properly considered to be directed at on-site fabrication and off-site fabrication at a “fabrication location” other than an employer’s permanent “shop”. It is insufficient, in the context of the UA provincial agreement and the structure of the *Labour Relations Act, 1995* as a whole to establish a general jurisdiction under the provincial agreement over all off-site fabrication of things which are ultimately installed on-site as part of construction work.

21. This interpretation is also consistent with Article 24, which deals specifically with fabrication. Assuming that the two bargaining agencies are able to legally bind the entities they are statutorily entitled to bargain for in the ICI sector with respect to matters beyond their statutory jurisdiction, and even if Article 24 can be read to extend the coverage of the UA provincial agreement to non-construction fabrication work, three things are apparent: first, some fabrication work is specifically excluded from the agreement; second, there is a distinction between “on the job” or on-site fabrication and off-site fabrication, and also between a “fabrication location” and a fabrication “shop”; and third, the UA has a shop agreement for such off-site fabricating (manufacturing) facility which it enters into with some employers (something of which the Board is also aware as the expert tribunal in the area).

22. The work in dispute in this case concerns the off-site fabrication in a manufacturing shop or facility. The Act contemplates the possibility that off-site work may be considered to be construction work - see the definition of “employee” in section 126 for example. As a practical example, operating engineers engaged in the repair and maintenance of construction machinery operated by operating engineers are considered to be performing construction work even when that repair or maintenance work is performed off-site in an employer’s permanent facility. However, off-site fabrication work is generally not considered to be construction work, and we are satisfied that the work in dispute in this case is not construction work.

23. Further, Kel-Gor supported the Boilermakers’ submission that the work in dispute relates or is analogous to self-contained packaged equipment with associated integral piping which is specifically excluded under Article 24.1 of the UA’s provincial agreement. The UA did not dispute this, and in any event, it is apparent that that is the case.

24. Accordingly, the Board is satisfied that the UA does not have a collective agreement which covers the work in dispute.

25. On the other hand, in addition to the Boilermakers’ provincial agreement, the Boilermakers and Kel-Gor are party to a “Shop Fabricating Agreement”, which specifically applies to Kel-Gor’s fabrication “plant” or shop, and specifically does not apply to field construction work. Notwithstanding that it is written as an “all employee” agreement, this fabrication agreement has not been applied to all employees; specifically not to UA members who perform UA label work, and UA members who have from time to time been assigned the work in dispute herein. Those UA members had the terms and conditions of the UA provincial agreement applied to them. But the performance of UA label work in that manner is not in dispute, and the past performance of the work in dispute in that manner is part of the history and is at the root of this dispute. It does not operate to bootstrap the UA into a position where it can assert bargaining rights which its collective agreement does not give it. Nor does it operate to remove the work in dispute from the Boilermakers’ fabrication agreement. The Board is satisfied that the Boilermakers’ shop fabricating agreement covers the work in dispute.

26. When considering a jurisdictional dispute complaint, the Board stands prepared to consider anything which is demonstrably relevant to the particular matter before it. Accordingly, it is neither possible nor appropriate to attempt to describe a definitive list of factors which will be considered, or to try to construct a formula which can be mechanically applied in that respect. Notwithstanding this, the Board has developed a general approach to jurisdictional dispute complaints which has withstood the test of time, and which has been accepted by the construction industry community. In this general approach, which has evolved over thirty years of dealing with jurisdictional dispute complaints, the Board begins (and as a practical matter often ends) with the consideration of six factors:

- trade union constitutions and applicable collective agreements;
- area practice;
- trade agreements;
- employer practice and preference;
- safety, skill and training;
- economy and efficiency.

27. The weight which is given to a particular factor or consideration depends on the circumstances of the particular case. In a given case, a factor may be of little or no assistance (or “neutral”, to adopt or paraphrase the nomenclature of many of the Board’s decisions which go through the factors), while in another case it may be determinative of the matter. As a general matter, it is not unusual for different factors to point in different directions, and in those circumstances a weighing or balancing must be performed.

28. For example, because of the historical development of the division of work in the construction industry on a trade or craft basis, and the overlap between the work jurisdictions asserted by the trade unions which represent employees in the construction industry, the work jurisdictions asserted by construction trade unions in their constitutions and under their collective agreements have become so broad that they are often of little assistance where the employer is bound to collective agreements with all the competing trade unions, particularly where the work in dispute is not part of the core of a trade’s work jurisdiction. Further, although the lack of an applicable collective agreement is a significant obstacle in the path of a trade union which seeks to have certain work assigned to its members, such a trade union will not necessarily fail in a competition for work with a trade union which does have an applicable collective agreement (see, for example, *Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143; *Pigott Construction Limited*, [1992] OLRB Rep. June 748 (“Pigott #2”), so long as the real issue is one of work jurisdiction, and not one of representation (*Simcoe Mechanical Contracting*, [1982] OLRB Rep. Sept. 1352).

29. The decision in *Pigott #2*, *supra*, must be read with caution. It should not be read as suggesting that it is inevitable that a trade union which has no applicable collective agreement, but which is successful in persuading the Board that particular work should be assigned to the trade in which workers it represents are engaged, will obtain a declaration or order that that work be assigned to that union’s members. In such circumstances, the Board may merely direct that the work in dispute be assigned to persons in the trade, who need not necessarily be members of a particular or any trade union.

30. Clause 99(1)(a) of the Act provides that:

99. (1) This section applies when the Board receives a complaint,

- 1(a) 1 that a trade union or council of trade unions, or an agent of either was or is requiring an employer or employers’ organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another;

31. This provision, which is not in the construction industry part of the Act, contemplates that persons who are members of a non-craft construction trade union, of a non-construction trade union, or of no trade union at all may be involved in a dispute concerning the assignment of work. There is nothing in this provision or elsewhere in the Act which operates to divide construction work among the Building Trades construction unions and their members, or which gives such trade unions a monopoly in that respect.

32. The purpose of the jurisdictional dispute complaint provisions in the Act has always been to provide a mechanism for resolving work jurisdiction disputes in a forum which provides an opportunity for all interested parties, whether or not they or any of them are construction industry parties, to be heard, and where all competing interests can be considered, without disrupting the workplace (*Toronto Star*, [1979] OLRB Rep. Aug. 811; *Napev Construction Ltd.*, [1980] OLRB Rep. Feb. 247; *Harold R. Stark Co. Ltd.*, [1982] OLRB Rep. Feb. 222 and April 576).

33. Consequently, in *Groff & Associates Ltd.*, [1994] OLRB Rep. July 846, the Board commented on the effect of the decision in *Pigott #2*, *supra*, as follows:

16. Consequently, where one of the trade union parties does not have an applicable collective agreement, a trade agreement will not necessarily, by itself, result in [an] award of work which it covers to the beneficiary trade union under that trade agreement, even in a contest with another trade union party to that trade agreement. The Board generally gives significant weight to jurisdiction arrangements between trade unions, subject to there being a good reason for not applying what appears to be an otherwise applicable trade agreement. For example, a dominant contrary area or employer practice in the appropriate geographic area may cause the Board to give less weight to a trade agreement. Nor will a trade agreement necessarily carry the day where the issue is one of representation, or one of both representation and trade jurisdiction.

17. In this case, for example, what if Groff had assigned the work in dispute to a composite crew consisting of an equal number of non-union sheet metal workers and members of the UA? Even the Sheet Metal Workers conceded that, on the basis of decisions like *Simcoe Mechanical*, *supra*, that scenario would raise a pure representation issue and it would have no real jurisdictional dispute complaint. What makes the situation different now? Even if the Board concluded that the work in dispute in this case should have been done by a composite crew of Sheet Metal Workers and Plumbers, on what basis would the Board declare that the Sheet Metal Worker trade component of the work should have been assigned to *members* of the Sheet Metal Workers' union, since there was nothing to oblige the employer to do so? Further, on what basis would the Board order, either with respect to the project in issue or in future projects, that Groff assign any sheet metal worker trade component of the work in dispute to *members* of the Sheet Metal Workers' Union rather than to any sheet metal worker tradesmen Groff chose, whether members of the Sheet Metal Workers Union or not? And why and [on] what basis would the Board make that kind of order?

18. As its name suggests there was a predecessor to *Pigott #2*; namely, *Pigott #1* (*Pigott Construction Limited*, [1990] OLRB Rep. April 441). Paragraphs 27 to 41 of *Pigott #1* read as follows:

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27. The fact that Pigott is bound together with the Carpenters and the Labourers to collective agreements which are the products of a collective bargaining relationship enforceable by statute and has no similar collective bargaining obligation to the complainants, *raises a rebuttable presumption* in favour of upholding Pigott's assignment to its carpenters and construction labourers who are members of the Carpenters and the Labourers. Pigott's collective agreements with the Carpenters and the Labourers give them exclusive bargaining rights for Pigott's carpenters and construction labourers and impose a legal obligation on Pigott to recognize those rights. That obligation would require Pigott to recognize, at the very least, that the Carpenters has some claim to the work listed in Schedule "A" of the carpenters provincial agreement and that the work listed arguably includes the work in dispute herein. While the claim in Schedule "A" does not express any better claim than that described in the complainants' collective

agreements, the claim in Schedule "A" has the strength of being founded in collective bargaining rights. The labourers provincial agreement does not express an independent claim to the work in dispute. Pigott's obligation to the Labourers under clause 2.06 of that agreement is to assign to members of the Labourers the work of "tending carpenters". Therefore, if Pigott assigns the work in dispute to the Carpenters, it must also assign to the Labourers the associated "handling and conveying of materials". While the Labourers' claim is dependent upon the Carpenters' claim, it too has the strength of being founded in its collective bargaining rights for Pigott's construction labourers.

28. Pigott has no comparable obligation to the IBEW and the UA. How, then, can those unions legitimately claim that Pigott was obliged to assign the work in dispute to IBEW electricians and UA plumbers? If there is an answer to that question that is favourable to the complainants, it is to be found in the construction industry context in which the dispute arises.

29. The work in dispute is in the industrial, commercial and institutional ("ICI") sector of the construction industry in Metropolitan Toronto and nearby municipalities, as were all 17 hospital construction projects in evidence herein. The unionized part of the ICI sector of the construction industry in Ontario has been subject to the province-wide bargaining scheme of the Act since 1978. Pigott, the Carpenters, the Labourers, the IBEW and the UA are parties to whom the province-wide bargaining scheme applies. The collective agreements binding upon Pigott, the Carpenters and the Labourers are products of bargaining under that scheme. While the IBEW and the UA are not bound to collective agreements binding on Pigott, they are bound to the electricians provincial agreement and the plumbers provincial agreement together with electrical and mechanical contractors for whose electricians and plumbers the IBEW and the UA hold bargaining rights in the ICI sector. When Pigott and the other general contractors on 16 of the 17 hospital construction projects in evidence decided to subcontract the work which included the installing of the patient service modules, they subcontracted the work to electrical or mechanical contractors bound to the electricians and plumbers provincial agreements. As a result of those subcontracts, the patient service modules were installed by IBEW electricians and UA plumbers under their respective provincial agreements. Where the patient service modules were to house both electrical and medical gas services, they were installed by crews composed of equal numbers of IBEW electricians and UA plumbers, except on Pigott's Scarborough Centenary Hospital project where they were installed by IBEW electricians. Pigott was not obliged, and there is no evidence the general contractors on the other hospital projects were obliged, once having decided to perform the work, to let it to a subcontractor who would have the work performed by persons belonging to those two unions. The Carpenters union was aware of those subcontracts and the resulting work assignments to IBEW electricians and UA plumbers, but did not contest any of them. So, whatever claim to the work in dispute the Carpenters union has under Schedule "A" and clause 19.01 of its provincial agreement or the collective agreements which were in force prior to province-wide bargaining in 1978, it did not rely on those provisions to claim the work by way of grievances or work assignment complaints.

30. Having work performed by way of subcontract to trade contractors like the electrical and mechanical contractors on the hospital projects, is fairly typical of building construction in the unionized part of the ICI sector of the industry. That practice results largely from the historical development of a division of labour in the construction industry based on the principle of operational specialization, particularly in the United States and Canada.

31. The effect of the division of labour by trade or craft is clearly visible in the international unions which represent construction tradesmen in Canada and the United States. Approximately 20 of these unions joined together to form the Building and Construction Trades Department of the AFL-CIO. They are known as the building trades unions. Some 13 of these building trades unions have a presence in construction in Ontario. They also are the unions who hold the exclusive bargaining rights for their trades under the province-wide bargaining scheme in the ICI sector. Historically each building trades union has sought to organize all of the employees in its trade rather than

all of the employees of an employer, as in the industrial union model. Each claims to itself exclusive jurisdiction in the construction industry for its trade and the work performed by the trade. That is one means by which each of these unions seeks to assure that its members will retain a share of the available work in the industry. These are institutional claims and, while the building trades unions will seek to enforce their claims through protective provisions in their collective agreements, they have used whatever lawful means which they thought would be effective in the particular circumstances. A classic work jurisdiction dispute results when a union perceives "its work" being done by persons other than its members and seeks to change that circumstance by demanding that it be done by its members. Where, as here, it occurs in the unionized ICI sector of the industry, it is a struggle between two or more of the building trades unions over which union's members will do the work.

32. One of the effects of operational specialization on building construction is visible in the way employers have organized themselves to perform construction work. Typically there are general contractors and trade contractors. A general contractor usually deals directly with the purchaser of construction and takes charge of an entire project. The general contractor may employ bricklayers, carpenters, construction labourers, cement masons (cement finishers), operating engineers and rodmen, but may, and frequently does choose to perform only a limited amount of work with its own employees. Instead it will choose to subcontract packages of work to subcontractors, many of whom will limit the work they take to that which is performed by one or two trades. These are the trade contractors and their specialization is defined by the trades which they employ and, in the unionized part of the industry, by the trade unions representing those trades. In the unionized ICI sector in Ontario, an electrical contractor employing only electricians represented by the IBEW and a mechanical contractor employing only plumbers and steamfitters represented by the UA would be common examples of trade contractors. 16 of the 17 hospital projects in evidence in this proceeding are examples of general contractors subcontracting packages of electrical and mechanical work to electrical and mechanical trade contractors.

33. One of the obvious consequences of such practices is that trade contractors are largely dependent upon general contractors continuing their subcontracting practices. So are the trade unions which represent those trades dependent on the practices continuing for there to be work opportunities for their members, unless, of course, the general contractor employs them directly to do the work. Where, as has happened here, the general contractor assigns work directly to a trade different from the one which would have performed it had the general contractor subcontracted the work, it poses a difficult dilemma for the trade union whose members lose the work opportunity. For example, in the instant case, the real complaint of the IBEW and the UA is with Pigott (and the Carpenters and the Labourers), but they have no collective agreements with Pigott and, therefore, no grievance and arbitration process available to them. The agreements binding on the IBEW and the UA are with electrical and mechanical contractors who likely share with the two unions their interest in retaining jurisdiction over the work in dispute. When Pigott disagreed with the complainants' claim to the work, they pursued the claim by filing this complaint under section 91 of the Act.

34. Work jurisdiction disputes are a perennial problem for the construction industry. Seen from outside the industry, they appear to be senseless fights between members of the building trades family of unions about which union's members are to get a particular work assignment; or, to put it another way, about which union's members will be employed and which ones will be unemployed. But when such disputes are viewed in the context of the operational specialization prevalent in the construction industry, the claim of jurisdiction over a particular kind of work is but one of several mechanisms relied on by the building trades unions to protect their members' share of the available work. Protecting work jurisdiction claims is an integral part of the union security provisions in construction industry collective agreements. The closed shop hiring hall system and limiting the subcontracting of the claimed work to contractors with whom the union has a collective bargaining relationship complete the protection. This approach to job security might not be acceptable outside of the construction industry, but that is

not reason to condemn its use in the industry. Those mechanisms both reflect and attempt to balance the economic and structural forces which operate in the construction industry.

35. This work jurisdiction dispute arises in the context of the unionized part of the ICI sector of the construction industry in Metropolitan Toronto and nearby municipalities. During the 13 years represented by the past practice evidence in this case, unionized contractors have been performing work in the sector and area with employees who are represented in collective bargaining by the building trades unions. Since January 1978, those relationships have been regulated by the province-wide bargaining scheme. Under that scheme, each building trades union can represent only employees in the trade for which it has been designated. It is in this context that the work in dispute has been performed on hospital projects exclusively by trade contractors under subcontract from general contractors, but for the single exception on the Credit Valley Hospital where the general contractor performed it with its own forces, members of the Carpenters. But for that exception, the work has been performed exclusively by IBEW electricians and UA plumbers employed by the trade contractors. That is the overwhelming past practice and clearly it is the product of the various contractor and trade union players in this segment of the construction industry playing out to the fullest extent the operational specialization characteristic of the industry.

36. Pigott previously has not assigned the work to the Carpenters and Labourers. Nor has it employed IBEW electricians or UA plumbers to perform the work. It has subcontracted the work to contractors who in turn have assigned it to IBEW electricians and UA plumbers. To this extent at least, Pigott has contributed to the area past practice of the work being performed exclusively by IBEW electricians and UA plumbers with the single exception of the Credit Valley Hospital project.

37. The letting of the work on the other projects to subcontractors and assignment of the work to the IBEW and the UA, was not contested by the Carpenters and Labourers. Clearly, there has been an acceptance of that subcontracting and of those assignments. With it there has developed a *consistent and long standing practice* of the IBEW and the UA installing patient service modules in hospitals where the modules will contain electrical and medical gas devices. Now, after 13 years of their members installing patient service modules on all but one of the hospital construction projects in Metropolitan Toronto and nearby municipalities, as a result of Pigott's assignment of that work to the Carpenters on St. Joseph's Hospital, the IBEW and the UA see their work being done by members of other trade unions. To them, that is a direct challenge to the stability of what they believe is their established work jurisdiction.

38. If the Carpenters, the Labourers and Pigott are correct and the IBEW and the UA cannot make a successful claim for the work in dispute under section 91 because they lack collective agreements with Pigott, there may well be no other lawful recourse open for the IBEW and the UA to establish that their consistent and long standing practice of installing patient service modules gives them jurisdiction over that work on hospital construction projects in the unionized sector of the construction industry in Metropolitan Toronto and nearby municipalities. From a practical point of view, they cannot gain jurisdiction by obtaining bargaining rights for Pigott's employees since it does not employ electricians and plumbers and the IBEW and the UA are prohibited by statute from representing any other trades in the ICI sector of the construction industry. If it is intended that the Board's jurisdiction under section 91 be used to fashion remedies which will lessen work assignment disputes in the construction industry, the result argued for by the Carpenters, the Labourers and Pigott would be counter to that objective. Furthermore, the result suggests that the Board would exercise its discretion under subsection 91(1) to refuse to inquire into a complaint if the trade union claiming the work in dispute does not have a collective agreement covering the work with the employer who is or was assigning it and the trade union to which it has been assigned does. From even the small sampling of the Board's jurisprudence on work assignment complaints relied on by the complainants, it would appear that the Board has not taken that approach. It would appear also that unionized employers in the construction industry and the trade unions which represent their employees either have accepted that a trade union can bring a work assignment complaint in those circumstances, or they have not persuaded the Board in

any reported decision to refuse to inquire into such work assignment complaints. Thus, to this panel of the Board, it appears that, prior to this complaint, the Board has not ever refused to consider whether any of the *other usual criteria were so compelling as to override the lack of a bargaining relationship* between the union claiming the work and the employer who was assigning it.

39. As noted already, the opposing claims for the work in dispute in this complaint pose the difficult question of whether the Board would direct an assignment which would have the effect of taking work away from persons in the trade union with a collective agreement covering the work, to which the employer who is or was assigning the work is bound, and give it to persons in a trade union which is not bound to a collective agreement with the employer, on the basis of a consistent and long standing practice of that union's members performing that work. The Board has considered it appropriate to set out at some length its views in that regard in deference to the importance of the issue and the attention given to it by the parties. Having done so, however, in the final analysis there is a further element of this complaint which compels the majority of the panel to not decide the question in this case. That element is clause 402 of the electricians provincial agreement. The clause, in the majority's view, makes this complaint a request that the Board direct Pigott to subcontract the work to a third party who will assign the work to a crew composed of equal numbers of IBEW electricians and UA plumbers. This is evident from looking at the effect of directing Pigott to assign the work to such a composite crew. Were the Board to make that direction, Pigott should have the same choices available to it when complying with the direction as it had when it first received its contract from St. Joseph's; that is, to perform the installation of the patient service modules with its own forces or subcontract the work. Should Pigott choose to assign the work to a crew of its own employees composed of equal numbers of IBEW electricians and UA plumbers, it would be unable to do so because of the restrictive hiring practice of the IBEW, one of the joint complainants. Instead, Pigott would have to engage in some form of subcontracting.

40. Thus, while the complainants have jointly asked the Board to direct Pigott to assign the work to a crew composed of equal numbers of IBEW electricians and UA plumbers, *the practical effect of the IBEW's hiring restriction is to make their complaint a request that the Board direct Pigott to subcontract the work to contractors who will assign the work in the requested manner. In these circumstances, the Board is of the view that Pigott's assignment of the work in dispute should not be disturbed.*

41. Accordingly, pursuant to the provisions of subsection 91(1) of the *Labour Relations Act*, the Board directs that Pigott Construction Limited continue to assign to carpenters in the United Brotherhood of Carpenters and Joiners of America, Local 27 and to construction labourers in the Labourers' International Union of North America, Local 506, the transporting from a central storage area to the point of installation and installing patient service modules on the walls of patient rooms, including the fitting of face panels and final clean-up, on the St. Joseph's Hospital project.

(emphasis added)

In *Pigott #2*, the Board (differently constituted in part than in *Pigott #1*) cited paragraphs 28 to 38 in *Pigott #1* but then went on to conclude that:

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11. Notwithstanding the above insightful comments, the Board in "Pigott I" in the end declined to make the declaration for a combined crew sought by the complainants because one of them at least, the IBEW, had a clause in their collective agreement, which they made clear to the Board they would not waive, and which effectively prevented them from supplying electricians to any contractor "whose business is not recognized as electrical work". That meant that an award by the Board in favour of the complainants was an award requiring Pigott to subcontract. The Mechanical Contractors Association of Ontario, as it turns out, some years ago negotiated a similar protection in Article 25 of its provincial agreement with the Plumbers'. However, it is clear from the evidence that the U.A. does have a policy of waiving that restriction, and that such waiver has in fact

been expressly recognized in its collective agreement to a degree in 1982, and to a further extent more recently. It is clear, therefore, that Pigott has the choice, should an award go in favour of the complainant, of engaging plumbers to do this work either directly, or through a subcontractor as it has on occasion done in the past.

12. For all of the foregoing reasons, we are of the view and declare that the claim asserted here by the complainant, that the work of installing the washroom accessories at the instant hospital in Toronto should have been assigned in accordance with the 1965 work-jurisdiction agreement between the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the United Brotherhood of Carpenters and Joiners of America, is correct and ought to be upheld.

In short, *Pigott #1* was not followed in *Pigott #2*, on the basis of the distinction drawn in paragraph 11 of *Pigott #2*.

19. Whatever *Pigott #2* means, it does not mean that an employer which makes an incorrect assignment of work will necessarily have to assign that work to tradesmen who are members of a particular trade union, or even that it will have to alter the original assignment at all. The Board adjudicates jurisdictional dispute complaints which are brought before it, as between the parties to the particular complaints. The Board is not a labour relations Solomon sitting ever ready to divide up the work jurisdiction pie. However, even though a trade union party to a jurisdictional dispute complaint which has no applicable collective agreement may be unable to persuade the Board to order that work in dispute be assigned to its members, it may be able to persuade the Board to declare that the disputed work belongs to the trade its members practice, or even to order that it be assigned to persons who practice that trade. While this may result in somewhat of an empty victory to a trade union which chooses to bring a jurisdictional complaint in circumstances where it has no collective bargaining relationship with the assigning employer, it would at least give that trade union an opportunity to organize and obtain representation rights for non-union tradesmen through either voluntary recognition or the certification provisions in the *Labour Relations Act*. This is particularly true now that jurisdictional dispute complaints can generally be brought and disposed of quite quickly.

20. Although the lack of a collective bargaining relationship will not necessarily be fatal to a trade union's claim for work, the result in cases like *Pigott #2* should not be taken to suggest either that the collective bargaining relationship factor is unimportant, or that the Board will necessarily direct that work be assigned to members of a craft trade union, even where the Board concludes that some or all of the work in dispute should have been assigned to the craft/trade in which members of that trade union are engaged. On the contrary, a trade union which complains about an assignment of work but has no collective agreement on which to base its claim, will have to satisfy the Board that there are compelling labour relations reasons to interfere with the employer's assignment.

21. In a jurisdictional dispute between two or more craft construction trade unions, it is appropriate for the Board to look to the trade agreement and the collective bargaining relationship factors for the purpose of determining how the work should be assigned as between the competing trades, and not just for the purpose of determining how the work in dispute should be apportioned between the competing trade unions, all in the context of the other relevant factors. The weight given to a trade agreement will depend on the circumstances, including whether it is a Local or International trade agreement, and how and the extent to which it has been applied with respect to the particular work in dispute in the relevant geographic area.

34. In the result, the presence or absence of an applicable collective agreement remains an important consideration in jurisdictional dispute complaints (see also, *Well-Bur Construction Ltd.*, Board File No. 1704-97-JD, February 9, 1998, unreported) [now reported at [1998] OLRB Rep. Jan./Feb. 124]. In some circumstances it will be determinative - against the trade union which has no applicable collective agreement.

35. This demonstrates that sometimes a single factor may be determinative of a jurisdictional dispute. Work jurisdiction trade agreements provide another example of a factor which may be given

so much weight as to effectively be determinative (especially in recent cases: *Pigott #2*, *supra*; *Ellis-Don Limited*, [1993] OLRB Nov. 1130, the various decisions in *Kora Mechanical Inc.*, [1992] OLRB Rep. June 740, and unreported decisions dated March 3, April 26, June 4, July 12 and November 8, 1993; but see, *Groff & Associates Ltd.*, *supra*, where the Board declined to give effect to a trade agreement when the established relevant area practice was inconsistent with it).

36. Similarly, area practice has taken on a rather singular importance in jurisdictional disputes. Although there are jurisdictional dispute complaints which have been determined in favour of the trade union which area practice did not favour (*Simcoe Mechanical Contracting Ltd.*, *supra*; *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185), area practice has become the single most common determining factor particularly in cases in which all the competing trade unions have collective agreements with the employer which cover the work in dispute (the classic case), and there is no applicable trade agreement. Indeed, in *Electrical Power Systems Construction Association*, [1992] OLRB Rep. Aug. 915, the Board observed that: "It is the rare and unusual complaint in which the Board does not attach significant and primary significance to area and employer past practice ...", and also that "... the real crux of most jurisdictional dispute revolves around the two part practice criteria." This emphasis on past practice is reflected in the time and energy devoted to the practice factors by parties in jurisdictional dispute proceedings before the Board.

37. On the other hand, a single factor will equally often not be determinative. The jurisprudence demonstrates that the effect of even the important collective agreement, trade agreement or area practice factors can be blunted by another factor or factors which alone or in combination carry equal or more weight in the particular case. Similarly, the non-neutral factors will not necessarily all suggest the same result. In these cases, the weighing or balancing which we have already referred to will have to be done to arrive at a determination.

38. In this case, we have already concluded that the work in dispute is not construction work, and that it is not covered by the UA provincial agreement. On the other hand, the Board is satisfied that it is covered by the Boilermakers' non-construction fabrication agreement (paragraph 25, above). That being the case, is there any reason why the work in dispute is not properly assigned to employees represented by the Boilermakers under that latter collective agreement?

39. In that respect, it is appropriate to consider the other five general factors. This includes Kel-Gor's practice, which includes assigning elements of the work in dispute to UA members under the UA provincial agreement.

40. The UA relies upon "INFO '67" as an "Agreement of Record" analogous to a trade agreement, and specifically on Rule 12 thereof, in support of its claim to the work in dispute. We reject that submission. INFO '67 is clearly directed at construction work. Further, Rule 12 is under the sub-heading "Refinery Installation", and as such does not relate to off-site fabrication work. Accordingly, INFO '67 does not apply. There is therefore no trade agreement which applies to the work in dispute.

41. The hybrid nature of this dispute makes it appropriate to consider area practice in the form of industry practice, as reflected by the operation of similarly situated employers. The practice and materials filed in this proceeding reveal a mixed approach as follows:

- (a) employers which operate in the construction industry and have off-site fabrication facilities, which are bound to both unions' provincial agreement, but with which neither union has a fabrication or shop agreement, tend to assign the work in dispute or work like it to members of the union which represents the trade which will be doing the on-site installation (construction) work, although there are some such employers

who deviate from this and assign the work in dispute to members of the UA;

- (b) there is no single demonstrated practice for such employers which are bound to both unions' provincial agreements and have a shop agreement as well, but the tendency appears to be to assign the work in dispute under the shop agreements; that is, to members of the union which has the shop agreement (which we observe includes another construction union (the Sheet Metal Workers' International Association), and also non-construction unions (International Association of Machinists, and the United Steelworkers of America)).

In the circumstances of this case, this factor can be given a little weight. To the extent that it can be given weight, however, it slightly favours the claim of the Boilermakers.

42. Kel-Gor's own practice is both rather incongruous and of recent origin. The employer's desire to avoid conflict is reflected in its willingness to accede to the UA's "squeaky wheel". However, the employer's tendency to revert to assigning such work to members of the Boilermakers, and hence the continuing nature of this dispute and this complaint, tends to suggest that Kel-Gor's own preference is to have the work done by employees represented by the Boilermakers under that union's shop agreement. In the UA's perspective, this factor is at best neutral, and at worst, it favours the Boilermakers.

43. It is apparent that members of both trade unions have the skill and ability to perform the work in dispute safely.

44. Economy and efficiency must generally give way to other considerations when the question concerns which of two or more skilled trades is properly assigned the work in dispute. It cannot be allowed to "trump" the other factors, particularly the collective agreement factor. Such business considerations cannot have the effect of making bargaining rights meaningless. Accordingly, economy and efficiency (and also employer preference) will only be significant as a kind of "tie-breaker", when an assessment of the other factors provides no clear answer.

45. In this case, economy and efficiency favours neither unions' claim.

46. During the consultation, some reference was made to the "job loss effect" of the determination of this matter. Whether this is considered as part of one of the traditional six factors, or as a separate factor, it will not generally be a particularly relevant consideration in its own right. The fact is that this concern will be subsumed in the consideration of the six traditional factors. Further, the result of a determination of a jurisdictional dispute complaint will generally mean fewer job opportunities for members of the union which has its claim rejected, but also a relatively concomitant increase in work or job opportunities for members of the union which has its claim upheld. This is inherent of the nature of jurisdictional disputes (and also the reason why so few of them are settled).

47. In this case, the Board is not satisfied that there is any cogent reason not to give effect to the collective agreement factor, particularly when a weighing of the rest of the factors tends to favour the claim of the Boilermakers in any event. On the other hand, to allow the UA's claim would have the effect of extending to the UA representational rights which that union does not have.

48. In the result, the Board is satisfied that the work in dispute (which does not include so called "UA label" work) is properly assigned to members of the Boilermakers, and the Board so declares.

2305-97-U Charles Tovey, and all persons signatory to Petition for Seniority, Applicants v. C.A.W. Local 222, Responding Party v. Mackie Automotive Systems (Whitby), Intervenor

Duty of Fair Representation - Unfair Labour Practice - Union negotiating change to seniority provisions of collective agreement to give seniority status to individuals hired through temporary service agencies - Union not explaining effect of new collective agreement at ratification meeting - Union providing Board with no explanation for why it failed to inform membership about potential effect on seniority list, or its rationale for reaching this understanding with employer - Board finding union's conduct arbitrary - Application alleging violation of union's duty of fair representation allowed

BEFORE: *Gail Misra*, Vice-Chair.

APPEARANCES: *Charles Tovey, Bill Joyce and Bill McLaren* for the applicants; *Lorna J. Moses, Mike Shields, Robert E. St Jules, Ray Bint, Vivian Terrelonge, Ron Boiuin, Shannon Dewitt*, for the responding party; *Clifford J. Hart, John Miller and Dawn Hillis* for the intervenor.

DECISION OF THE BOARD; March 2 1998

1. This is an application made pursuant to section 96 of the *Labour Relations Act, 1995*, alleging a breach of section 74 of the Act. A consultation was held regarding this matter on February 19, 1998. As Mackie Automotive Systems (Whitby) attended the hearing as an intervenor, the style of cause is hereby amended to include it as a party.
2. The applicants complain that the C.A.W. Local 222 (the "union") has breached its duty of fair representation by agreeing with Mackie Automotive Systems (Whitby) (the "employer" or "Mackie") to add to the seniority list persons hired through temporary service agencies. Pursuant to the understanding reached, once a temporary employee has worked for 90 or more days at Mackie, that person becomes a Mackie employee, and his/her seniority is calculated from the day he/she started being assigned to Mackie. The effect of this agreement has been that about six temporary employees who had been placed at Mackie for some time have been granted seniority ahead of other persons who had already been employees of Mackie on the seniority list. The applicants claim that the union made this agreement with the employer outside of the collective agreement, without the knowledge of the membership, and in breach of section 74 of the Act. They further allege that although one of the applicants had filed a grievance regarding this situation, the union withdrew the grievance.
3. The union argues it has not breached its duty of fair representation. It states that the union negotiated the issue of employee status for the temporary employees in the last round of bargaining, which culminated with a new collective agreement being reached in May 1997. The proposed collective agreement was ratified by the membership of the union. With respect to the grievance which the applicants claim was improperly withdrawn, the union states that it considered the grievance, but in light of its recent negotiations and the new language of the collective agreement, the union determined it could not proceed with the grievance to arbitration, and therefore withdrew it. A majority of the committee considering that issue voted for withdrawal.
4. The employer submitted that in the course of the last round of negotiations the workplace parties also settled three other grievances regarding the issue of seniority for temporary employees. The union had agreed to the resolution of those grievances based on what it had negotiated for the new

collective agreement. Therefore, it is argued that the union's withdrawal of the applicants' grievance is consistent with the union's position during negotiations, and with the language negotiated.

5. Mr. Tovey et al. state that while the members voted to ratify the new collective agreement, they did not realize the ramifications of the new language, and that it may result in temporary employees getting seniority over permanent Mackie employees. The applicants believe that had the membership realized the implications of the changes to the language of the agreement, they may not have ratified the contract. It would appear that since Mackie had been in a period of rapid growth there had been extensive hiring of staff, in addition to the use of temporary employees assigned through employment agencies. Thus, when the temporary employees were granted seniority, some placements on the seniority list were by way of leap frogging over 100 Mackie employees. The applicants complain that the temporary employees had not had to pay union dues for all their tenure, while the Mackie employees who have been displaced did. The union states that the employer has paid the union for all union dues which would be due for the temporary employees who have now been added to the Mackie payroll. The applicants nonetheless take issue with this because they claim the temporary employees themselves never had to pay the union dues.

6. The applicants seek as a remedy an order from the Board that an employee's seniority date shall be the actual date of hire by Mackie, and that that order be made retroactive. They also seek costs.

7. In reaching my decision I have considered the submissions of the parties, all of the documentation relied upon by the parties, and the Board's jurisprudence in section 74 complaints.

8. In the first collective agreement between the union and Mackie, reached in May 1994, the relevant Seniority and Temporary Help provisions were as follows:

ARTICLE 12 - SENIORITY

- 12.01 An employee shall be regarded as a probationary employee until he/she has been in the employ of the Company for ninety (90) calendar days during any twelve (12) consecutive months. After completion of the above probationary period, the employee shall then be assigned a seniority date as of his/her most recent date of hire.

ARTICLE 13 - TEMPORARY HELP

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- 13.02 Such Temporary employees shall not be allowed to work more than eighty-nine (89) consecutive days in regular production operations, or thirty (30) consecutive work days in Rework operations. They shall not be permitted to gain seniority status with the Company.

9. In November 1995 a grievance was filed by Bill Joyce, one of the applicants, complaining that the employer had violated Article 13 by allowing five temporary employees to gain seniority status. It would appear that the parties settled that matter and agreed that temporary employees would be considered employees of Mackie beginning on the 90th day of their employment. No seniority would be counted from before that point. This was the prevailing regime until the last round of negotiations.

10. In 1997 the workplace parties negotiated a new collective agreement to be effective from May 26, 1997 to May 25, 2000. The language of Article 12 was amended, and the Temporary Help provision was removed in its entirety. The relevant portion of Article 12 now states:

ARTICLE 12 - SENIORITY

- 12.01 An employee shall be regarded as a probationary employee until he/she has worked a total of sixty (60) days in any twelve (12) month period. After the completion of the probationary period, the employee shall be assigned a seniority date as of his/her first day worked, providing seniority has not been broken as per Article 12.05.

11. On May 26, 1997 the union bargaining committee sent a “CAW Bargaining Report” to all of the members informing them that a new tentative agreement had been reached and that the bargaining committee was recommending the settlement unanimously. Explanatory notes were provided regarding each of the changes to the previous language. Among other things, the notes indicate that the probationary period has been reduced from 90 calendar days to 60 days worked, and that the temporary help language has been deleted from the collective agreement. Nothing in the notes tells the membership that the union had agreed that once a temporary employee has passed what would be a probationary period for a regular employee, that employee would become a regular employee and would have his/her seniority run from the date the employee started at Mackie. No submissions were made about the conduct of the ratification meeting and what information may have been provided at that time, but Mr. Tovey claims that had the members known about this matter, they would not have ratified the contract. The majority of the bargaining unit ratified the new agreement.

12. The day after the ratification meeting, on May 27, 1997 Mr. Tovey filed a grievance claiming that temporary employees were being given their seniority in the manner outlined above in paragraph 11. He did not know that this was what the union had negotiated. He also claimed that the employer had paid the back union dues for these individuals who had now got onto the seniority list.

13. The employer responded to the grievance stating that there had been no violation of the collective agreement and that this issue had been discussed in negotiations. The bargaining committee met to discuss Mr. Tovey’s grievance and decided that based upon the union’s negotiations, and the language of the collective agreement, it served no purpose for the grievance to proceed any further. The committee therefore withdrew the grievance and informed Mr. Tovey of the decision in August 1997. It was in early August 1997 that Mr. Tovey became aware of the union’s negotiations regarding this matter, and that it had in fact agreed to have temporary employees placed on the Mackie seniority list from those employees’ original date of coming to work at Mackie.

14. Mr. Tovey then circulated a petition regarding the seniority issue, and this application was subsequently filed on September 22, 1997.

15. Section 74 of the Act states:

74. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

16. In its decision in *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, the Board considered the content of the duty under section 74:

36. Section [74] requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirements that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee’s bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective

bargaining concerns. “Bad faith” and “discriminatory”, therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. “Arbitrary”, on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

17. The Board has accepted the argument made by applicants that where a union’s decision results in significant employment detriment to an employee whom it represents, that decision ought to attract careful Board scrutiny (see for example *Retail Wholesale Canada Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Ontario Taxi Union) and Blue Line Taxi Co. Limited*, Unreported, Board File Nos. 1455-94-U and 1637-94-U, Feb. 21, 1997). In that case the Board stated that the more serious the consequences of the union’s decision on the interests of its members, the greater is its responsibility to ensure that it does not act rashly.

18. On the other hand, the Board has also expressed the view that in assessing how unions perform their duties, it is unrealistic and unreflective of the nature of these organizations, to impose legalistic notions of “due process” on them since unions are not composed of lawyers.

19. It is with these principles in mind that I have reached my decision in this matter. The union, as the bargaining agent for the employees of Mackie, has both the authority and the obligation to bargain with the employer. It is generally accepted that the union’s duty is to bargain provisions for the benefit of its members, although the interests of each individual member may not be met, and the union has the right to decide what may be best in all of the prevailing circumstances. This case is troubling because the union knowingly bargained about giving temporary workers seniority rights which the union knew or ought to have known would displace existing members’ seniority rights. It was certainly entitled to do so, but it then failed to inform the members that it had bargained an understanding which could result in some bargaining unit members losing their place on the seniority list. The union asked the members to ratify the collective agreement it was recommending, told them that the temporary worker provisions were gone, and that there were changes to the probationary period, but left out the information about the impact of the changes to these provisions.

20. Further, the union provided the Board no explanation for *why* it failed to inform the membership about the potential effect on the seniority list, or even of its rationale for reaching this understanding with the employer. The Board therefore has nothing before it to assist it in understanding in what context the decision was made, or what the competing interests may have been.

21. Seniority is an important right which unions negotiate for in the collective bargaining process. It can give employees some rights or protections in the event of a layoff or recall from a layoff. It may also have other ramifications, in the context of job postings or in the exercise of bumping rights. It is therefore not surprising that such a large number of members of this union have expressed their concern and disenchantment with their union’s negotiation of a deal giving the employees of *other* employers seniority rights which may displace the seniority rights of persons who had been hired by Mackie, and who have had to pay union dues during their tenure as Mackie employees. It is also not surprising that these applicants have seen the union’s silence on this issue at the crucial time of ratification of the new collective agreement as a breach of trust.

22. In the circumstances of this case, and in the absence of any explanation from the union, I find that the union’s conduct falls short of the statutory standard and was arbitrary. In my view the union should at the very least have given the members enough information so that they could have known that they should have asked questions about the implications of the changes to Articles 12 and 13. This is not to say that a union has to spell out to its members each and every aspect of changes it has negotiated in a new collective agreement. However, it is not too stringent a standard to set to

suggest that a bargaining agent should provide enough information to allow for informed debate and decision-making, especially with respect to matters which may be of significance to the job security of members.

23. I find no breach of section 74 in the union's handling of Mr. Tovey's grievance. The union accepted the grievance, considered it in light of what it had negotiated, and decided in a democratic manner not to pursue it. Mr. Tovey was informed of the withdrawal of his grievance, and of the reasons thereof. In these circumstances there is no breach of the duty of fair representation, as a union has the right to decide what grievances it wishes to pursue, so long as in reaching that decision it does not act arbitrarily, discriminatorily, or in bad faith.

24. The remedy the applicants are seeking is not available to them at the Board. In any event, since I am of the view that the union had the right to negotiate what it did, and my only concern is with what the union told or did not tell the members, it is difficult to envisage an effective remedy. In the circumstances a declaration is in order, and, for the reasons outlined above, the Board therefore declares that the union has breached section 74 of the Act.

4740-97-M United Food and Commercial Workers, Local 1227, Applicant v. Maple Leaf Pork, a Division of Maple Leaf Meats Inc., Responding Party

Collective Agreement - Final Offer Vote - Interference with Trade Unions - Interim Relief - Intimidation and Coercion - Remedies - Strike - Unfair Labour Practice - Union alleging that employer's various unfair labour practices led striking employees to vote in favour of final offer vote - Union asking for interim order restricting employer from taking any steps to implement final offer - Application for interim order dismissed

BEFORE: *Timothy W. Sargeant*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

APPEARANCES: *Judith McCormack* for the applicant; *Daniel J. Shields* for the responding party.

DECISION OF TIMOTHY W. SARGEANT, VICE-CHAIR, AND BOARD MEMBER J. A. RUNDLE; March 20, 1998

1. This is an application under section 92.1 of the *Labour Relations Act, 1995* (the "Act") for a number of interim orders namely:

1. An order that the responding employer cease and desist from taking any steps to implement the employer's final offer, or any steps which indicate to employees that the employer's final offer is in effect, pending the disposition of Board File No. 4622-97-U.
2. Without restricting the generality of the foregoing, orders prohibiting the responding employer from:
 - a) taking any steps in regard to paying out the cash payments to employees referred to in the responding party's letters of February 26th to employees;
 - b) taking any steps in regard to offering employees financial counselling in regard to the aforesaid cash payments;
 - c) taking any steps in regard to any other aspect of the aforesaid cash payments;
 - d) taking any steps in regard to the pension funds; and

- e) taking any steps with respect to calling employees back to work, or scheduling them for work, or requiring them to make any decisions relating to whether they will work;

pending the disposition of Board File 4622-97-U.

- 3. An order prohibiting the employer from contacting employees directly, or making statements which would be likely to alienate employees from their bargaining agent, pending the disposition of Board File 4622-97-U.

In addition at the hearing counsel for the applicant asked for an order “prohibiting the responding party from closing the Burlington plant”.

2. By way of background, the collective agreement expired on November 14, 1997. The applicant commenced a legal strike on or about November 15, 1997. Early negotiations were unsuccessful and led to a section 96 application being filed by the applicant (Board File No. 2986-97-U) alleging that the responding party had breached sections 5, 17, 54, 70, 72, 73, 76 and 78 of the Act. Negotiations continued on January 28, 29, February 10, 12 and February 25, 1998 according to the pleadings filed. These negotiations did not result in an agreement between the parties. The respondent requested the Ministry of Labour pursuant to section 42 of the Act to direct a vote on its final offer. The Minister directed such a vote which was held on March 6, 1998. The result of the vote was 454 ballots cast in favour of acceptance of the final offer of the respondent, and 368 ballots cast for rejection of the final offer.

3. Prior to the vote being conducted the applicant filed a section 96 complaint alleging a breach of sections 5, 17, 70, 72, 73 and 76 of the Act. Without detailing the full particulars of this application, the essence of the application is that the responding party had through its actions and correspondence sent to employees, threatened, coerced, intimidated and bribed employees so that their true wishes could not be expressed in any vote taken under section 42. The applicant’s allegations of threats, coercion and intimidation are largely based on the respondent’s correspondence to employees that it would close the Burlington plant if the final offer was rejected and also that the responding party would not sell the plant to a competitor. The allegation of bribes are based on the lump sum cash payments provided to employees under a formula in the final offer, which payments could range in excess of \$20,000.00 to an incumbent employee. As part of the relief, the responding party in this application asks for a declaration that the vote conducted on March 6, 1998 is “null and void”.

4. The responding party, wrote to the applicant on March 9, 1998 enclosing a “copy of the Collective Agreement” for signing. To date, given the applicant’s position in relation to vote, the applicant has not signed this document.

5. The responding party, following the vote, according to the declaration of Stephen Ingram, Vice-President and General Manager of the Maple Leaf Pork processing facility in Burlington:

In anticipation of the employee’s return to work and the resumption of operations at Burlington Pork, Maple Leaf reinstated employee benefits effective March, 1998. In addition, Maple Leaf took steps to begin offering financial planning counselling to interested employees. Eighty-six (86) employees participated in financial counselling sessions on Wednesday, March 11, 1998 prior to our receipt of the Union’s application.

6. The applicant then filed this application for the interim orders as set out in paragraph 1. In essence the applicant is asking the Board to prevent the responding party from implementing any terms of the final offer until its section 96 application, Board File 4622-97-U has been decided.

7. We are informed by counsel for the responding party that it has filed an application under section 96 of the Act that the applicant in this proceeding has breached section 17 of the Act by not signing the collective agreement forwarded to it on March 9, 1998.

8. The parties have asked that the Board render its decision on this request for interim orders as quickly as possible. In these circumstances, the Board does not feel it is necessary to review in detail the correspondence or actions alleged by the applicant that form the basis of its section 96 complaint.

9. In the Board's decision *OPSEU v. The Crown* [1996] OLRB Rep. September/October 780 the Board considered its jurisdiction to issue interim decisions and the factors it might consider. As the Board stated in paragraph 45:

45. It is difficult to attempt to list the myriad factors that the Board considers when dealing with applications for interim relief, for one can fairly describe the approach as an attempt to take into account all the relevant circumstances, including, as *Ombudsman* indicates, the interests of the responding party. Those circumstances include a consideration of the nature of the specific remedy sought, and the fact that an interim order is an extraordinary remedy and ought not to be granted without consideration for the appropriateness of granting such relief before a hearing on the merits. Interim intervention in a bargaining relationship, or a potential one, may itself bring negative consequences for the relationship between the parties. Thus, the Board on occasion has dealt with applications of this nature by deferring consideration of the interim application and scheduling the merits to be heard in an expedited fashion.

10. Generally as set out in an earlier decision between these parties (Board File 3133-97-M), the Board first assess whether the application raised an arguable case for the relief requested. If so, the Board then balances the harm from granting the relief requested against the harm that would flow if relief was not granted.

11. Both counsel made extensive argument on this application. Having considered the submissions, the Board finds there is an arguable case for the relief requested. The Board in *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. November 1583 determined that though a final offer vote normally would require a union to execute a collective agreement, the Board "cannot take the position that no standard of review is proper".

12. As the Board stated in *Canada Cement Lafarge Ltd.* at paragraph 16:

Pre-vote conduct or communications involving coercion, intimidation, threats, or undue influence can undermine the reliability of a directed vote and cannot be tolerated or have been intended. To require the trade union to execute a collective agreement where an employer has engaged in such conduct would simply contribute to the illegality and reward the wrongdoer.

13. In this instance, clearly an issue is raised by both the section 96 application filed by the applicant (Board File 4622-97-U) and the section 96 application filed by the respondent as to whether or not the applicant is obligated to execute the collective agreement.

14. On the issue of 'harm' in the declaration of Greg Zikos, on behalf of applicant, the following statements are relevant:

15. The employer through its conduct has created a climate of fear and confusion on the part of employees. This has created a mercurial and highly time-sensitive situation where any attempt by the employer to implement its last offer and to call employees back to work is likely to compound the effect of the employer's conduct.

16. One of the remedies requested on the main application is that the employer cease and desist from bargaining directly with employees. If the employer is permitted to pay out the cash payments it offered employees directly, this will make that part of the main application essentially useless.

17. Other remedies requested on the main application include a declaration that the final offer vote is null and void, an order requiring that the employer rescind its threats and statements about the applicant, and an order that the employer return to the bargaining table. If the employer is permitted to implement its final offer, this will severely impair or render ineffectual such remedies.

18. The ability of the union to represent employees in collective bargaining and conduct an effective strike has been seriously compromised by the responding employer's conduct. Allowing the employer to proceed as if there were a collective agreement and to recall employees to work will further exacerbate this damage.

19. If the employer is permitted to proceed with the implementation of its final offer and to recall employees, it will be extremely difficult, if not impossible, to unravel this situation subsequently without incurring further damage to the applicant's representation of employees.

20. In addition, requiring employees to decide whether they will be returning to work while the legality of the employer's cash payment offer to them is being determined by the Board would place them in a dilemma.

15. On this issue, in the declaration of Stephen Ingram for the responding party the following statements are relevant:

41. To date, the Union's representatives have refused to sign the collective agreement. As a result, Maple Leaf Pork has suffered and will continue to suffer damages in the form of unabsorbed fixed costs and other direct losses at Burlington Pork at the rate of approximately \$200,000.00 per week as it remains unable to commence operations of Burlington Pork. Furthermore, Maple Leaf Pork is unable to institute a back to work protocol unless and until the Applicant executes the collective agreement as it is required to do. Particulars of the fixed cost losses suffered on a weekly basis due to the Union's conduct from March 10, 1998 are as follows:

Taxes and Insurance	35,000
Utilities	40,000
On-Going Maintenance	15,000
Security	20,000
Salaried and Office Staff	20,000
Depreciation	65,000
Quality Control at Co-Packers	<u>5,000</u>
	\$200,000

This amount includes no consequential losses nor does it reflect any absorption of inter-company charges or fixed costs for services provided such as advertising, promotion, accounting or legal services. If these amounts were included the weekly losses could be as great as \$300,000.00.

46. I have taken these steps to stop the implementation of the collective agreement on the advice of counsel but the delay is of grave concern. I am concerned with the very significant financial losses which are described earlier. I am also very concerned that we are being asked to refrain from proceeding with items for our employees that we agreed to implement in a timely way and also that I am restricted in telling employees anything that is happening. This has been a very difficult labour dispute for me personally. I believe it has been difficult for the employees, I believe the vote expressed the will of the majority. I want to get back to work. I believe the employees who had agreed to come to work on Friday, March 13, 1998 are ready to come back to work.

47. In addition, if the relief sought by the Applicant in this interim application is granted, the labour dispute at Burlington Pork will continue indefinitely and Maple Leaf Pork will be unable to commence its operations until the collective agreement accepted by the employees is no longer the subject of litigation. As a result, Maple Leaf Pork will continue to incur damages in excess of \$200,000 per week as described. In addition, I am concerned that Maple Leaf Pork will have no recourse or remedy to recover these damages if the Board grants the relief. In particular, I am concerned that the Local Union does not have sufficient assets to satisfy the huge losses which the Company is experiencing due to the Union's conduct should the Company's position prevail in this litigation or any other proceeding.

16. Counsel for the applicant submitted that unreasonable harm to the applicant would occur if payments as required in the final offer were made to employees - it would make one of the remedies the applicant sought moot. To allow the responding party to implement the final offer would in effect put a *de facto* end to the coercion and be extraordinarily difficult to unravel. Further it would be unfair to ask employees to make the choice of whether to return to work, in these circumstances. For example, it is unfair for employees to have to choose whether to return to work, not knowing if the respondent has acted contrary to the Act or not knowing whether the strike is still lawful. To allow the responding party to implement the terms of the final offer would promote self help. The best option, counsel argues, is to maintain the status quo that existed before the vote, namely that employees remain on strike with the plant not operating.

17. Counsel for the respondent on this point argues that it would be an extraordinary remedy not to allow an employer to operate. There is a substantial money cost to the employer in not operating. If it was prohibited from ceasing operations these costs would be ongoing. In regards to the status quo argument counsel submits that the applicant is trying to unilaterally change the status quo. The status quo is that even during a strike an employer is allowed to operate. Further employees are allowed to come to work if they wish. Even if there was no final offer vote, the respondent could offer employees an opportunity to work based on its last offer. Under section 80, counsel maintains that employees have a right to return to work. Given the extraordinary nature of the request the balance of harm clearly should be weighed in favour of the respondent.

18. On this latter point, counsel for the applicant stated it did not intend to interfere with an employee's right to return to work under section 80, and would agree that any order of the Board could clarify this position.

19. The Board has considered the submissions of the parties. There is a third party involved, namely employees. Certainly under the Act employees have a right to return to work based on the last offer of the respondent. The respondent takes a risk if it pays this money and subsequently it is found that the applicant is not obliged to execute a collective agreement. Though the Board understands the concerns of the applicant, it is not convinced that appropriate remedies cannot be fashioned if the applicant is successful in its section 96 complaint. If it is not successful the applicant runs the risk that the Board may award damages. The Board agrees with counsel for the respondent that the potential harm to his client is greater than the potential harm to the applicant.

20. For the above reasons, the Board dismisses this application.

DECISION OF BOARD MEMBER RENE R. MONTAGUE; March 20, 1998

1. I strongly disagree with the disposition of the majority. Had the majority decided this application on the basis of the Board's settled approach to interim orders, instead of merely paying it lip service, they would have concluded that the balance of harm in this case weighed heavily in favour of granting the orders sought. A good illustration of the Board's long settled approach is set out in a decision of the present Chair of the Board in *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019 at p. 1032 where the Board wrote:

"... we do think it necessary to consider what "harm" may occur if an interim order is not granted, and what "harm" may occur if it is granted; moreover, that assessment should be made from a *labour relations perspective*, having regard to the scheme and purpose of the Act..." [emphasis added]

2. As I will endeavour to explain below, the potential harm to the union in this case of not granting the relief sought is substantial. Indeed, while the Board has held that it is not necessary that

there be irreparable harm before the Board will grant interim relief, this is one of those occasions where such harm would indeed occur if such relief is not granted. On the other hand, the potential harm flowing to the employer from granting interim relief is primarily *financial* and fully compensable in damages.

3. The statutory tribunal responsible for promoting and safeguarding employees' freedom of association rights must never shy away from fulfilling its statutory mandate. As for potentially competing "business" or "commercial" rights, a unanimous panel led by the present Chair of the Board said it best in *Nelson Quarry*, [1995] OLRB Rep. June 825 at pp. 838-839:

"The right to operate a business is not derived from or dependent upon the *Labour Relations Act*... Obviously, a collective bargaining activity may impinge upon the way in which a business operates in the marketplace. But we do not think that those business activities are themselves rights under the *Labour Relations Act*, created, derived from or addressed in the statute. They are not statutory rights."

4. It follows that in a contest with important statutory rights, an employer's "business" rights (or, put another way, the threat of "business" or "economic" loss) should *not* prevail. The majority, apparently, does not see it this way.

5. Every case, of course, must turn on its own specific facts. In this case, the following facts are important.

6. The union and its members have been engaged in a very public, very bitter strike since November 14, 1997. In February of this year, the employer applied to the Minister of Labour for a vote of employees on its final offer. *That final offer represents the most dramatic and adverse change in working conditions that I have ever seen in my 30 years' involvement in labour relations — provincially, nationally and internationally, in any industry.*

7. On February 28, 1998, the employer sent a letter to each employee which was received on March 2, 1998. The letter contains passages in which the employer: (i) offers individualized cash payments to each employee within 15 days, together with a "secure future", if they vote to accept the employer's offer; and (ii) threatens that the plant will close and that employees will lose their jobs if they vote to reject the contract. The letter directs various disparaging statements at the union, and accuses the union of being willing to sacrifice the jobs and cash payments of employees in order to close the plant.

8. On March 3, 1998, the employer also sent a letter to employees which, among other things, (i) describes the union as wanting employees to sacrifice their jobs so that someone else will get it; (ii) sets up the union in opposition to employees and seeks to generate conflict between them; and (iii) reiterates that the employer is not bluffing about closing down the plant and that it will close the plant if employees do not accept the employer's offer.

9. On March 4, 1998, the union filed an unfair labour practice complaint with the Board (the "main application"). It alleges that the employer has violated the Act by intimidating employees, by failing to recognize the role of the union, by interfering with the union's representation of employees, by attempting to circumvent the union and deal directly with employees and by threatening to discriminate or discriminating against employees exercising rights under the Act. The union asks that the employer be directed to rescind its threats and to cease and desist its unlawful conduct. The Board has also been asked to declare the final offer vote null and void.

10. On March 6, 1998, the final offer vote was conducted. About 55% of the employees voted to accept that offer.

11. As the majority has recognized, the union has pleaded an arguable case that the employer has committed very serious violations of the Act. It is, to say the least, arguable that it was the employer's illegal conduct that generated the majority employee vote in favour of the employer's offer. Assuming that the employer has acted illegally, the prejudice to the union already generated is profound. If the union is right and if the employer's conduct is fairly described as coercive and threatening, is it not obvious that the union's present ability to fulfill its statutory responsibilities has been seriously undermined by that conduct? Does it not also follow, if the union is right, that the employer has abused the process established in section 42 of the Act to further undermine the union and weaken its collective bargaining position?

12. What harm will the union suffer if no interim order issues? In a nutshell, permitting the employer to implement its final offer and to call employees back to work, will compound the effect of the employer's conduct and render the main application largely, if not entirely, moot.

13. Permitting the employer to proceed with the implementation of its final offer and to recall employees will mean that the Board will be faced with a *fait accompli* by the time it renders its decision on the main application. Such a *fait accompli* will be impossible to displace without further damage to the union's representation of employees. The majority indicates that the interests of employees must be taken into account. I agree. But the result of the majority decision is to require employees to decide whether they will be returning to work while the legality of the employer's cash payment offer to them is being determined by the Board. The effect of that is that employees will be required to essentially gamble on the outcome of the main application.

14. On the other hand, what harm will the employer suffer if the interim order is made? The majority has already reproduced paras. 41 to 47 from the declaration of Steven Ingram for the company. I take the liberty of again reproducing this excerpt:

"41. To date, the Union's representatives have refused to sign the collective agreement. As a result, Maple Leaf Pork has suffered and will continue to suffer damages in the form of fixed costs and other direct losses at Burlington Pork at the rate of approximately \$200,000.00 per week as it remains unable to commence operations of Burlington Pork. Furthermore, Maple Leaf Pork is unable to institute back to work protocol unless and until the Applicant executes the collective agreement as it is required to do. Particulars of the fixed cost losses suffered on a weekly basis due to the Union's conduct from March 10, 1998 are as follows:

Taxes and Insurance	35,000
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Salaried and Office Staff	20,000
Depreciation	65,000
Quality Control at Co-Packers	<u>5,000</u>
	\$200,000

This amount includes no consequential losses nor does it reflect any absorption of inter-company charges or fixed costs for services provided such as advertising, promotion, accounting or legal services. If these amounts were included the weekly losses could be as great as \$300,000.00.

46. I have taken these steps to stop the implementation of the collective agreement on the advice of counsel but the delay is of grave concern. I am concerned with the very significant financial losses which are described earlier. I am also very concerned that we are being asked to refrain from proceeding with items for our employees that we agreed to implement in a timely way and also that I am restricted in telling employees anything that is happening. This has been a very difficult labour dispute for me personally. I believe it has been difficult for the employees, I believe the vote expressed the will of the majority. I want to get back to work. I believe the employees who had agreed to come to work on Friday, March 13, 1998 are ready to come back to work.

47. In addition, if the relief sought by the Applicant is this interim application is granted, the labour dispute at Burlington Pork will continue indefinitely and Maple Leaf Pork will be unable to commence its operations until the collective agreement accepted by the employees is no longer the subject of litigation. As a result, Maple Leaf Pork will continue to incur damages in excess of \$200,000.00 per week as described. In addition, I am concerned that Maple Leaf Pork will have no recourse or remedy to recover these damages if the Board grants the relief sought. In particular, I am concerned that the Local Union does not have sufficient assets to satisfy the huge losses which the Company is experiencing due to the Union's conduct should the Company's position prevail in this litigation or any other proceeding."

15. Even a novice labour relations practitioner would know that a strike that has unravelled as a consequence of the unfair labour practices alleged could never, ever, be re-mounted. In the absence of an order from the Board, employees will return to work (or resign their employment and accept the financial buy-out) and a collective agreement will *de facto* be imposed. Yet, the majority says that it is not convinced that appropriate remedies cannot be fashioned if the union is successful in its section 96 complaint. Does the majority honestly think that a "cease and desist direction" or a "board posting" or even "damages" can restore the union's position? How could a Board remedy imposed months from now undo the grave damage done to the union? Is it not appropriate for the majority to recognize, as *the Board has in countless other cases*, that delay often alters the labour relations context so substantially that the Board's final remedial powers are simply *inadequate*.

16. In my view, the harm pleaded and relied upon by the employer is primarily, if not exclusively, financial in nature. The Board has on many occasions confirmed that "financial harm" should *not* figure prominently when balanced against significant "labour relations harm". (See, most recently, *Airline Limousine*, unreported decision dated February 27, 1998 (Board File No. 3715-97-M). See, also, *Morrisson Meat Packers Ltd.*, [1993] OLRB Rep. April 358 and *Price Club*, [1993] OLRB Rep. July 635.)

17. In this case, when one weighs the significant labour relations harm to the union against the primarily "financial harm" to the employer, the balance falls *dramatically* in favour of granting relief. I would have allowed the application and granted the orders requested. I would further direct that the pending unfair labour practice applications be listed for hearing (or continuation of hearing) immediately, and that they be heard on consecutive days from Monday to Friday until completed.

18. It seems to me that a faithful approach to the Board's established jurisprudence would have — and should have — produced a different result in this case.

3865-97-R International Brotherhood of Electrical Workers' Local Union 402, Applicant v. Marken Electric Ltd., Responding Party

Bargaining Unit - Certification - Construction Industry - Representation Vote - Parties disputing eligibility of certain individuals to vote in certification application - Board applying *Marsil Mechanical* case and holding that individual was an employee in the bargaining unit and should have his ballot counted because he was doing electrician's work on application date and, although he was not a registered electrical apprentice in Ontario, he was not engaged in the trade for more than three months (and was, therefore, lawfully employed under Trades Qualification and Apprenticeship Act) - Board describing work performed by second individual as essentially clerical and clean-up work and not work in electrical trade - Board finding second individual not entitled to cast ballot in representation vote

BEFORE: *G. T. Surdykowski*, Vice-Chair.

DECISION OF THE BOARD; March 26, 1998

1. This application for certification in the construction industry was filed on January 20, 1998.
2. By decision dated January 26, 1998, the Board directed that a representation vote be held on January 28, 1998. It was, but because of the dispute between the parties regarding who was entitled to vote, the four ballots cast were segregated and the ballot box has been sealed pending the resolution of those issues.
3. Subsequently, in February 1998, the parties made written submissions in accordance with the Board's usual practice, regarding the issues between them.
4. By decision dated March 9, 1998, the Board (differently constituted) concluded that some of the issues could be determined on the basis of the submissions which had been provided, and opined that the remaining issues could probably be disposed of with the assistance of further written submissions which the Board went on to order. In that respect, the Board determined that:
 - (a) Chris Graham was entitled to cast the ballot;
 - (b) that Robert Pelletier was at work on the certification application date.
5. The parties' have now made further written submissions as directed by the Board: the employer under cover of letter dated March 16, 1998, and the union by letter dated March 20, 1998.
6. The Board is satisfied that the remaining issues can now be disposed of with the assistance of these further written submissions.
7. The employer concedes that Garth Eyolfson was not at work on the certification application date. That is the end of the inquiry. In construction industry applications for certification an employee must be at work in the bargaining unit on the certification application date. The nature of the employment relationship as a general matter, or the reason for an employee's absence on that particular day are irrelevant (for a recent review of the Board's approach in this respect, see, *Ken Anderson Electric Inc.* [1996] OLRB Rep. Sep/Oct 846). Mr. Eyolfson was therefor *not* entitled to cast the ballot.
8. It is common ground that Robert Pelletier is not a registered electrical apprentice in Ontario. The trade of electrician is a compulsory certified trade under the *Trades Qualification and Apprenticeship Act*. Accordingly, a person must be employed in accordance with that Act in order to be included in a bargaining unit of journeymen and apprentice electricians. However, as the Board pointed out in *Marsil Mechanical Inc.* [1997] OLRB Rep. Jul/Aug 636, this does not necessarily mean that a person must be a journeyman or a registered apprentice on the certification application date in order to be included in such a bargaining unit. A person can work in a compulsory certified trade for up to three months without running afoul of the *Trades Qualification and Apprenticeship Act*. In this case, there is nothing to indicate that Mr. Pelletier was engaged in the trade for more than three months. Indeed, the employer's submissions suggest the contrary. Further, the employer states that Mr. Pelletier was performing the following work on the certification application date:
 - (a) attaching chain to ceiling and cutting to length to accommodate the hanging of light fixtures on the chair;
 - (b) running wire as required to the junction boxes for fixtures (all electrical connections were performed by electricians and not by Mr. Pelletier);
 - (c) general clean-up of the tools and site;

- (d) assistance as required such as locating and retrieving ladders for electricians.

The work identified in (a) and (b) is electricians work. The clean-up work associated with work of the trade is also work of that trade (*Ellis Don Ltd.* [1994] OLRB Rep. Sept. 1222). The work identified in (d) is sufficiently connected to the work of the trade to be included in it. Accordingly, Mr. Pelletier was an employee in the bargaining unit herein on the certification application date. As such he was entitled to vote and his ballot should be counted.

9. The employer states that on January 20, 1998, Norman Trimble performed the following work:

- (a) assembled PCV pipe, boxes, connections and couplings as required for transportation to the Whitefish Water Treatment Construction project;
- (b) made up a material list for material to be transferred to the Whitefish Construction project, which work took approximately three hours on January 20, 1998;
- (c) sorted material and inventory respecting items returned from prior construction job sites for re-stocking inventory (0.5 hours of work);
- (d) general shop clean-up (0.5 hours of work).

The clerical and clean-up work described in (b), (c) and (d) is clerical and general clean-up work which is not work in the electrical trade. It is interesting that the employer claims that he spent four hours performing this work, while the timesheet that the employer filed with its February 1998 submission indicates that he only worked four hours that day. This would leave no time for the work described in (a) (indeed, unlike (b), (c) and (d), the employer does not indicate the amount of time Mr. Trimble spent doing (a)). In any event, that work is in the nature of assembly and shipping work. Some of the assembly work could conceivably be fabrication work sufficiently connected with the job site to be considered construction work, but is not apparent that all of it would be. Further the shipping work, which he must have spent some time performing is not construction work. It is therefore clear that even on the employer's facts, and even if some or all of the assembly work could be considered to be bargaining unit work, Mr. Tremble did not spend the majority of his time on the certification application date performing construction industry bargaining unit work. He was therefore *not* entitled to cast the ballot.

10. In the result, only Chris Graham and Robert Pelletier were entitled to cast ballots in the representation vote held herein.

11. The Registrar is directed to proceed with the counting of their ballots forthwith.

1039-97-R Labourers' International Union of North America, Local 183, Applicant v. National Homes Inc., Responding Party

Certification - Construction Industry - Employee - Evidence - Practice and Procedure - Witness - Union applying to represent bargaining unit of construction labourers employed by employer - Employer asserting that application should be dismissed because none of the individuals who voted in representation vote spent a majority of their time performing construction labourer work on the application date - Union producing disputed individual as its witness at

certification hearing in accordance with Information Bulletin No. 3 - Board allowing union's request to cross-examine witness, in accordance with Information Bulletin No.3, where witness giving evidence adverse to union's interest - Board explaining rationale for rules on ensuring attendance of witnesses in status disputes - Board rejecting employer's submission that "service work" as a whole, regardless of tasks performed, is not construction labourers' work - Board also rejecting union's position that all service work is work of a construction labourer such that there is no need to analyze the nature of the work performed - Board concluding that all three individuals spent a majority of their time on the application date performing work of construction labourer and, therefore, eligible to vote

BEFORE: *D. L. Gee*, Vice-Chair.

APPEARANCES: *M. Lewis* and *J. Vala* for the applicant; *Joseph Liberman*, *Sheryl Johnson*, *Pino Trentedue* and *Rocky Pantalone* for the responding party.

DECISION OF THE BOARD; April 16, 1998

1. The style of cause is hereby amended to refer to the responding party as "National Homes Inc."
2. This is an application for certification under the construction industry provisions of the *Labour Relations Act, 1995* (the "Act"). By decision dated June 26, 1997, the Board (differently constituted) directed that a representation vote be taken in the following voting constituency:

all construction labourers in the employ of National Homes Group Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

3. The vote was held on June 30, 1997 as directed by the Board. Three persons, Messrs. Oliveira, Marciel and Machado, cast ballots. All three individuals were challenged by the responding party on the basis that they were not performing construction labourers' work for a majority of the day on June 23, 1997, the application date, and accordingly the ballot box was sealed. This matter was listed for hearing for the purpose of determining the status of the individuals in dispute.

Evidentiary Issue

4. During the course of the applicant's questioning of Mr. Oliveira, an issue arose as to whether the applicant would be permitted to ask Mr. Oliveira leading questions. I ruled that the applicant would be permitted to put leading questions to Mr. Oliveira. My reasons for so ruling are as follows.
5. Prior to July, 1996, status disputes were referred, by the Board, to a labour relations officer for the purpose of conducting examinations and preparing a report to the Board on the issues in dispute. The conduct of an officer's examination was summarized in *PHI International Inc.*, [1980] OLRB Rep. Dec. 1789 at paragraph 10 as follows:

10. ... Frequently, all that will be necessary is a check of the employer's records which will usually contain sufficient information to resolve the question. If the records are inadequate or do not provide enough information on the particular issue in dispute (for example, whether a person is "managerial" or employed in a particular capacity) the person can be examined directly. If the individual is not currently employed by the employer, and is not, therefore, readily available to the parties the Board will normally issue a subpoena so that he can be present for examination. As a

convenience to the parties, this subpoena will generally be served by an employee of the Board. Likewise, when an individual has been subpoenaed, the Board officer will generally begin the inquiry by asking a number of fairly standard questions which in most circumstances will throw some light on the employee's status. When the questioning is completed, the parties are then permitted to cross-examine the witness, as well as call such other evidence as they consider relevant to the matter in dispute....

6. Following the conclusion of the officer's examinations, it was the practice that the evidence would be transcribed and the resulting report circulated to the parties for comment. Often, a single day of hearing was scheduled so that the parties could make oral submissions to the Board concerning the conclusions the Board should reach. The Board would then issue a decision based on the officer's report and the submissions of the parties.

7. Commencing in July, 1996, the Board introduced a number of changes to its practice with respect to status disputes in construction industry certification applications which were aimed at reducing Board expenses. The Board's current practice is set out in Interim Information Bulletin No. 3 - Status Disputes in Certification Applications in the Construction Industry ("Information Bulletin No. 3").

8. As Information Bulletin No. 3 indicates, the Board no longer subpoenas the individuals in dispute. Unless otherwise ordered by the Board, the party who asserts that an individual is on the list of voters is responsible for ensuring that individual's attendance at the Board and calling the individual as a witness. Further, officers are no longer appointed to conduct examinations and the evidence adduced is no longer transcribed. Instead, where it is necessary for evidence to be adduced with respect to the issues in dispute, a Board hearing is held. This change has the effect of saving officer time and avoiding the costs and delays associated with preparing a transcript of the officer examinations.

9. The Board decided to create a policy with respect to which party is responsible for producing the individuals in dispute and calling them as witnesses in order to ensure that the parties would be in a position to determine, in advance of the hearing, where such responsibility lies. It was decided that the party that asserts that an individual is on the list would be responsible for producing the individual and calling him/her as a witness as it is presumed that, where a party is asserting an individual is *on* the list, that party has some evidence in support of its position and further that there is an open line of communication between the party and the individual. Where either or both of the presumptions are true, the party asserting that an individual is on the list would have a basis from which to question the individual and more readily elicit evidence from him/her relevant to the dispute. Recognizing, however, that the Board's policy may result in a party being required to call an individual who testifies to a state of events with which the party calling the witness does not agree, Information Bulletin No. 3 was drafted so as to stipulate, in bold print, that "[t]here may be circumstances in which a party calling a witness is allowed to cross-examine the individual".

10. In the case of Mr. Oliveira, the applicant was required to secure his attendance at the hearing and call him as a witness because the applicant asserts that he is on the list. However, it became clear very early on in the applicant's examination of Mr. Oliveira that the applicant and Mr. Oliveira were not agreed as to what work Mr. Oliveira performed on the date of application. The applicant was asserting (and intended to call evidence, to this effect) that Mr. Oliveira spent a significant portion of the date of application cleaning out a house. Mr. Oliveira was testifying that he spent no more than 40 minutes cleaning out the house and spent the remainder of the day correcting deficiencies. Clearly, Mr. Oliveira was not testifying to a factual scenario with which the applicant agreed.

11. When it became clear that Mr. Oliveira's evidence was not consistent with the applicant's assertion of what Mr. Oliveira was doing on the date of application, counsel for the applicant sought to cross-examine Mr. Oliveira. Counsel for the responding party objected.

12. In my view, it was appropriate to permit the applicant to cross-examine Mr. Oliveira. The fact that Mr. Oliveira was called by the applicant as a witness was solely as a result of the Board's policy requiring it to do so. The Board's policy was devised to facilitate the conduct of hearings and the elicitation of evidence, not to prevent a party from exploring evidence adverse to its position. Further, the Board's policy anticipates situations where the party required to call an individual in dispute will be permitted to cross-examine the individual. The Board requires that the party who asserts that an individual is on the list should call that individual as a witness. As the Supreme Court of Canada remarked in *R. v. Coffin*, [1956] S.C.R. 191, 114 C.C.C. 1, although there is a general rule of evidence against a party asking its own witness leading questions, courts have a non-reviewable discretion to relax it whenever necessary in the interests of justice. Pursuant to section 111(2)(e) of the *Labour Relations Act, 1995*, the Board has the power to accept evidence as it considers proper, whether admissible in a court of law or not. In the present case, it was my view that it made no sense to prohibit the applicant from cross-examining Mr. Oliveira when he was giving evidence adverse to the applicant's interests, and permit only the responding party, which Mr. Oliveira's testimony favoured, to cross-examine him. It was my determination that the interests of justice would be best served by permitting the applicant to cross-examine Mr. Oliveira and I so ruled.

Merits

13. At the commencement of the hearing, the parties' positions were as follows. It was the responding party's position that the individuals in dispute spent a majority of the date of application engaged in "service work" and that "service work" is not the work of a construction labourer. Without intending to exhaustively define the term, "service work" generally includes the rectification of deficiencies immediately prior to or following the closing of a home and the performance of repairs to the house for a period of two years following closing pursuant to the HUDAC warranty applicable to all new homes. The applicant took the position that it is not accurate to say that service work as a whole is not the work of a construction labourer. Rather, some "service work" is the work of a construction labourer whereas other "service work" may not be. In the applicant's submission, the Board should examine the work performed by the individuals in dispute on the date of application and determine whether a majority of the individuals' time was spent performing work that constitutes construction labourers' work. Having regard to the evidence called and challenged by the applicant, it was apparent that the applicant did not consider many of the tasks performed by the individuals in dispute in connection service work to be the work of a construction labourer.

14. On the day before the parties presented final argument, the Board's decision in *Mattamy Homes Limited*, Board File No. 0083-97-R, February 4, 1998, as yet unreported, was released [now reported at [1998] OLRB Rep. Jan./Feb. 70]. The applicant in the instant case was also the applicant in *Mattamy Homes Limited* and was seeking its standard non-ICI construction labourers bargaining unit. In *Mattamy Homes Limited*, the applicant took the position that individuals who were performing service work were not within a construction labourers' bargaining unit on the date of application on the basis that they did not spend a majority of the day engaged in the work of a construction labourer. *Mattamy Homes Limited* took the position that the work performed by the individuals in dispute was the work of construction labourers such that they were performing bargaining unit work for a majority of the day on the date of application. For the reasons set out in the decision, the Board determined that it was appropriate to place the individuals in dispute in the labourers' bargaining unit.

15. Thus, on the day of final argument, the applicant changed its position from that outlined above to argue that the Board need not examine the tasks performed on the date of application by the individuals in dispute because the Board in *Mattamy Homes Limited* determined that "service work" as a whole is construction labourers' work and that such determination is sufficient to lead to the

conclusion in the instant case that the three individuals in dispute spent a majority of their day on the date of application performing construction labourers' work.

16. The responding party argued that *Mattamy Homes Limited* is wrong and argued that the correct approach is to determine the status of the individuals in dispute based on whether or not they spent a majority of their time on the date of application performing construction labourers' work and that, as demonstrated by the industry practice set out below, construction labourers' work does not include service work. The parties' arguments are set out in greater detail below.

17. For the reasons set out below, it is my view that the position taken by the applicant at the commencement of the hearing is the appropriate approach. It cannot be said that "service work" is not the work of a construction labourer because the institutional parties have, in limited circumstances, treated it that way. Rather, service work should be analyzed and considered in the same fashion as the Board considers any other work performed on the date of a certification application. If the "service work" performed can also be said to be the work of a construction labourer, and if the individual spent a majority of his day engaged in the work of a construction labourer, then that individual is on the list of eligible voters. In the present case, assuming the individuals to have performed the work asserted by the responding party, it is my determination that they spent a majority of their day performing work falling within a construction labourers' bargaining unit and are therefore properly on the list of eligible voters.

Work Performed

18. National Homes Inc. is a low-rise residential house builder. On the date of application, one of the individuals in dispute, Joe Oliveira, was working on a job site referred to as the "Mississauga Site". The remaining two individuals, Dinis Marciel and Victor Machado, were working on a job site referred to as the "Brampton Site". Messrs. Oliveira and Machado are employed by National Homes Inc. as servicemen. Mr. Marciel is employed as a labourer. As of the application date, both the Mississauga and Brampton job sites were in the very final stages. Many of the homes on both job sites had closed and were occupied.

19. I have assumed the responding party's assertions concerning the work which was performed on the application date to be factually correct. Thus, on the application date, Mr. Oliveira arrived at Lot 12 at approximately 8:00 a.m. Mr. Oliveira cut out a spot in the floor, replaced it with a piece of plywood and cleaned up the mess he made. He left Lot 12 at approximately 8:40 and went to Lot 258. Lot 258 was scheduled to close on the application date. Mr. Oliveira had been provided with the pre-delivery inspection report (the "PDI") by the customer service co-ordinator and directed to rectify the deficiencies noted thereon. As a result, Mr. Oliveira spent the next six hours performing a number of jobs including: finding missing plugs for the sinks and tubs and spindles for the toilet paper holders; checking to ensure the existence of phone wires in the basement; touching up scratches in the paint and stucco; removing marks on doors and stains from carpets; adjusting doors and drawers; installing trim and kick plates; applying silicone and caulking around bathroom fixtures; and replacing burnt out light bulbs. Most of the tasks performed took 10 to 15 minutes. The task which took the longest period of time to perform was fixing the stucco on the ceiling which took an hour and a half. A few of the items on the list had already been looked after. The garage door, which the PDI indicated had to be installed, had in fact been installed. Carpet which was missing from the basement stairs had been installed. Three painting deficiencies had been rectified by the painting subcontractor. Mr. Oliveira indicated that any painting jobs which would take two hours or more are done by the painting subcontractor. After Lot 258, Mr. Oliveira proceeded to Lot 274 where he replaced trim that had fallen off of an outside window of a house that was occupied. Replacement of the trim took approximately one to one and a half hours.

20. Victor Machado and Dinis Marciel worked together all day on the date of application. They started work at approximately 7:30 a.m. and spent one to two hours installing window wells around basement windows following which they spent approximately one hour painting the construction trailer which was being converted for use as the service trailer. Following their morning break, Messrs. Machado and Marciel spent approximately an hour cleaning garbage up from around the exterior of the trailer. Some of the garbage was used for service work and some of it was construction debris or related to construction activity. The next hour was spent cleaning construction and service materials out of the trailer and putting it in the sales office. After lunch, Messrs. Machado and Marciel spent the afternoon repairing deficiencies. The work included filling in holes in the exterior brick wall of houses with cement, repairing trim on windows and caulking windows. Messrs. Machado and Marciel spent approximately four and a half hours performing such deficiency work.

Industry Practice

21. There was little if any dispute between the parties as to the prevailing industry practice regarding servicemen for the past decade. The responding party relies on the industry practice in support of its assertion that “service work” is not the work of a construction labourer.

22. The current collective agreement between the Toronto Residential Construction Labour Bureau and the Labourers’ International Union of North America, Local 183 (the “Low-Rise Agreement”) stipulates that final house and window cleaning and on-going housekeeping maintenance are exempt from the subcontracting provisions of the agreement. While the applicant does not agree with the responding party’s assertion that service work is thus excluded from the agreement, the applicant agrees that there is agreement between the parties that full-time servicemen are considered to be outside of the construction labourers’ bargaining unit.

23. Full-time servicemen are generally multi-skilled and have considerable contact with the homeowners. Servicemen may drive a company vehicle stocked with most of the supplies required to rectify deficiencies and often carry a pager. In the event of layoffs, the labourers are generally laid off first with the servicemen being the last to be laid off.

24. The Board was advised that the parties have a common understanding as to how service work is dealt with in the context of a certification application. An individual who spends a majority of his day performing service work, regardless of whether that individual is a full-time serviceman who spends the majority of the day performing his normal job functions or a labourer who, on the date of application, spends the majority of his day performing service work instead of labourers’ work, *is not* considered to be an employee in the bargaining unit. Likewise, an individual who spends a majority of his day performing labourers’ work, regardless of whether that individual is a full-time serviceman who spends a majority of his day performing labourers’ work instead of his usual job functions or a labourer who spends the majority of the day performing his usual work, *is* considered to be an employee in the bargaining unit. The same treatment applies when any other trade union applies for certification.

25. Following certification, where the builder is large enough to employ full-time servicemen they are not typically considered to be in the bargaining unit. Where the builder is smaller such that the individuals who perform the service work are also engaged in the performance of labourers’ work, such individuals would typically be considered to be in the bargaining unit.

Argument

26. As indicated above, the applicant argued at the commencement of the proceedings that service work could include the work of a construction labourer and that the work performed must be examined to determine if such was the case and the amount of time so spent, but changed its position

following the release of *Mattamy Homes Limited* to argue that all service work is construction labourers' work.

27. The responding party argued that *Mattamy Homes Limited* is wrong and should not be followed. The responding party argued, by way of example, that it is simply incorrect to say that the touching up of paint or installation of wood trim is the work of a construction labourer. These tasks are clearly the work of the painting and carpentry trades respectively. Further, the responding party submits that it is incorrect to assert that tasks such as the locating and insertion of a sink plug or the replacement of a burnt out light bulb are construction work. Given that the majority of the tasks performed by a serviceman are, in the responding party's submission, the work of a construction trade other than the labourers or are not construction work at all, the responding party submits that there is no logic to the assertion that a serviceman is performing the work of a construction labourer.

28. The responding party relies on the industry practice as supportive of the assertion that service work is not construction labourers' work and that the bargaining unit does not encompass servicemen. The Low-Rise Agreement excludes maintenance and clean-up from the subcontracting provisions and there has been an understanding in existence between the parties for a decade to the effect that servicemen are not in the construction labourers' bargaining unit. In response, the applicant argued that the scope of work covered by the Low-Rise Agreement is irrelevant as parties are always free to alter the scope of the bargaining unit following certification. With respect to the prevailing industry practice, the applicant indicated that, if it was the Board's determination that servicemen are construction labourers, the industry would have to adapt.

29. In response to the Board's suggestion in *Mattamy Homes Limited*, that the situation is "unworkable", the responding party points out that the present situation has worked quite successfully for a decade. Further, it is suggested that there is a means by which the servicemen could obtain trade union representation. A trade union could apply for a unit of all unrepresented employees. In the responding party's submission, the answer to the situation is not to thrust bargaining rights on the applicant when it has not sought to represent the individuals in question.

30. Concerning the Board's decision in *PHI International Inc.*, [1980] OLRB Rep. Dec. 1789, which was relied upon by the Board in *Mattamy Homes Limited* in support of the conclusion that service work is the work of a construction labourer, the responding party points out that it was decided prior to *Gilvesy Enterprises Inc.*, [1987] OLRB Rep. Feb. 220 and *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41 wherein the Board eliminated the use of a "representative period" in determining whether an individual is in the bargaining unit and indicated that it would henceforth use a test which focuses on what the individual spent a majority of his time doing on the date of application. The responding party thus argues that post *Gilvesy* and *E & E Seegmiller*, the Board applies the "majority of time" test and only finds servicemen to be in the labourers' bargaining unit if they in fact spent a majority of their day performing labourers' work. The responding party relied on the Board's decisions in *Wraymar Construction and Rental Sales Ltd.*, [1989] OLRB Rep. June 682 wherein the Board commented that an individual will be considered to be in whichever bargaining unit he spends the most time in even where such does not constitute the "majority" of his day and *Eddie Bauer*, [1989] OLRB Rep. Oct. 1041 wherein the Board ruled that the "majority of time test" applies where the individual spends a portion of his time in non-construction related activity.

31. The responding party relies on the Board's decision in *Nu-West Development Corporation Ltd.*, [1983] OLRB Rep. May 692 in support of its position that servicemen are not construction labourers. In *Nu-West Development Corporation*, the Board described the work performed by the individuals in question as follows:

6. The three employees in question deal essentially with the HUDAC warranty for new homes. Thus, the prime reason for their job is to conduct a series of four inspections at periods of two weeks, three months, six months and 12 months of various purchasers of the homes from the respondent employer. In the course of their duties in this regard they are required to deal with the purchasers of the homes in question. It is also part of their duties to effectuate any repairs that they can perform, but where they are unable to perform such repairs then call in the "appropriate trades" to perform the repairs. In this respect they perform work similar to the construction labourers employed by the respondent to deal with the cleaning up of the project at the end of the construction season.

The Board concluded that they were not construction labourers but rather "service employees" and as such were excluded from the bargaining unit. The Board distinguished *PHI International Inc.* on the basis that the individuals in issue in *PHI International Inc.* did clean up and repairs post closing as part of their normal job whereas the "servicemen" did not spend any of their time cleaning.

32. The Board was also provided with copies of *Darrow Developments Ltd.*, [1987] OLRB Rep. Oct. 1238, *Ming Sun Holdings Inc.*, [1987] OLRB Rep. Dec. 1585 and *Runnymede Development Corporation Limited*, [1988] OLRB Rep. Sept. 976 in support of the proposition that servicemen are not construction labourers.

Decision

33. As indicated above, I do not accept the position advanced by the responding party to the effect that "service work" as a whole, regardless of the tasks performed, is not construction labourers' work. While I recognize that, for in excess of a decade, the industry has treated service work, when performed by an individual on a full-time basis, as something discrete from the work of construction labourers, and that such arrangement, from the industry's perspective, has been eminently workable, the Board is not constrained by such arrangements. In the course of determining who is in the unit for the purposes of a certification application, the Board has always included all employees who were performing bargaining unit work on the date of application for a majority of the day in the unit. I am not persuaded that the Board should depart from this practice in this case.

34. I equally do not accept the position advanced by the applicant at the stage of final argument to the effect that all service work is the work of a construction labourer such that there is no need to analyze the nature of the work performed. Again, I am simply not persuaded that this application should be treated differently from any other application for certification.

35. Thus, I accept the position advanced by the applicant at the commencement of the proceedings. The work performed on the application date is to be reviewed and a determination made as to whether the work is that of a construction labourer. I further accept the comments of the Board in *PHI International Inc.* and *Mattamy Homes Limited* to the extent that they stand for the proposition that many of the tasks performed by servicemen are not tasks that fall within the core of a trade but rather are tasks that might be performed by a trade as peripheral to their core work or might be performed by a construction labourer. Many of the tasks typically performed by a serviceman are tasks which fall within an area of overlap between the work of the trades and the work of construction labourers.

36. Support for the determination that construction labourers do many of the tasks performed in connection with service work is found in the industry practice recited by the parties and set out above. Where service work is performed by an individual on a part-time basis, which appears to be the norm for small home builders, that individual is a labourer and is covered by the Low-Rise Agreement. When there is more service work to be done than can be managed by those designated the title "serviceman", labourers are assigned to assist. On the facts before me, Mr. Machado, a labourer, was performing

service work on the date of application. Thus, it is apparent that the tasks associated with service work, are tasks commonly performed by labourers and can thus constitute labourers work.

37. I turn then to an examination of the facts at issue in the instant case to determine if the individuals in dispute spent a majority of the day on the date of application performing bargaining unit work.

38. Mr. Oliveira spent six hours on the date of application engaged in repairing deficiencies. They are detailed in paragraph 19 above and thus I will not repeat them here. The work performed required him to engage in a multiplicity of relatively low skilled tasks each of which took a very small period of time to complete. Setting aside the stucco repair to the ceiling with respect to which I make no comment, none of the remaining tasks can be said to fall within the core of a trade's work jurisdiction. They are tasks falling within the area of overlap between the work performed by labourers and the work performed by the trades. It is thus my determination that, of the maximum eight hours and ten minutes that Mr. Oliveira worked on the date of application, he spent a minimum of four and a half hours, or a majority of his day, performing bargaining unit work. He is thus properly on the list of employees eligible to vote.

39. Turning to the work performed by Messrs. Machado and Marciel, having regard to my determination that service work can constitute the work of a construction labourer, there is little question that Messrs. Machado and Marciel spent the majority of their day engaged in work in the bargaining unit. The time spent installing window wells is the work of a construction labourer as is cleaning up garbage and moving materials. Likewise, the time spent patching holes and caulking windows in the afternoon was time spent engaged in the work of a construction labourer. Thus, it is my determination that Messrs. Machado and Marciel spent the majority of the day on the date of application engaged in the work of a construction labourer and are also properly on the list.

40. In the result, it is my determination that all three individuals in dispute spent a majority of their time on the application date performing bargaining unit work and accordingly are on the list of employees for the purposes of the vote.

41. This matter is referred to the Manager of Field Services to arrange for the counting of the ballots in accordance with this decision.

4410-97-R Ontario Secondary School Teachers' Federation, Applicant v. **Niagara Catholic District School Board**, Responding Party v. Canadian Union of Public Employees, Intervenor

Certification - Timeliness - Public Sector Labour Relations Transition Act, 1997 - Union filing certification application twelve (12) calendar days after employer's application under section 22 of Public Sector Labour Relations Transition Act (PSLRTA) filed with the Board - Section 28(2) of the PSLRTA barring certification applications commencing ten (10) days after Board receiving request under section 22 of the PSLRTA - Board concluding that reference to "days" in section 28 meaning calendar days - Certification application dismissed as untimely

BEFORE: Sharon C. Laing, Vice-Chair, and Board Members J. A. Rundle and D. A. Patterson.

DECISION OF THE BOARD; March 6, 1998

1. This is an application for certification filed with the Board on February 18, 1998 on behalf of the Ontario Secondary School Teachers' Federation.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act, 1995* (the "Act").

3. On February 6, 1998, the Board received from the Niagara Catholic District School Board, a request for an order determining the number and description of bargaining units appropriate for operation pursuant to section 22 of the *Public Sector Labour Relations Transition Act, 1997* ("Bill 136").

4. The Canadian Union of Public Employees, the intervenor in this matter takes the position that pursuant to section 28(2) of Bill 136, the application for certification is untimely as it has been filed during the period beginning ten days after the order is requested and before the order is made. The intervenor seeks the dismissal of the application for certification on this basis.

5. The applicant, in its reply, submits that the ten days referred to in section 28(2) of Bill 136, ought to be interpreted by the Board as "working" days. The Ontario Secondary School Teachers' Federation urges the Board to continue with its well-established practice of excluding Saturdays, Sundays, and holidays in the computation of time for its own purposes. In support of its position the applicant relies on the Board's Rules of Procedure in respect of the Act and the Interim Rules under Bill 136.

6. Section 28(2) of Bill 136 provides as follows:

28.(2) During the period beginning 10 days after the order is requested and ending when the order is made, no person may apply for certification of a bargaining agent to represent employees of the successor employer who are not members of a bargaining unit when the order is requested.

7. What Bill 136 does not provide is a definition for the term "day". The comments of the Board in respect of the ninety day period under subsection 10(12) of the *Hospital Labour Disputes Arbitration Act* are helpful in this regard. In *The Corporation of the City of St. Thomas* [1997] OLRB Rep. May/June 373 the Board observed the following:

• • •

50. The parties also differed in their views as to how to calculate the different time periods should we find that November 26, 1996 was the "date the board of arbitration gives its decision". Although not now necessary to address in the circumstances of this case, again, a few comments may provide some guidance. The issue in respect of the 90 day period under subsection 10(12) of the HLDAA was whether it was "calendar" days or "working" days. Local 220 relied on the recent changes to the certification provisions in the Act, noting that votes are held within five working days, not calendar days. However, subsection 8(5) of the Act makes specific reference to the exclusion of Saturdays, Sundays, and holidays for purposes of that calculation and is not a useful guide. In the absence of any qualification limiting the period to working days, we prefer to give the words their normal meaning, that is, the period is one of 90 (calendar) days.

51. We are of the view that under section 7(4) of the Act (and similarly under the termination provisions) the reference to the "last two months" is not usefully determined by counting back on the basis of a varying number of days depending on the months in issue. Rather, it is a calculation going back "two months", that is, where agreements commonly expire at the end of a month (December 31) the last two months commence on the first day of the second last month (November 1). If the agreement expires other than at the end of the month, for example on November 14, the last two months in this example would commence on September 15. The only potential anomaly created by this method arises where an agreement expires on May 29 or 30 because of a short February.

8. Although the Board has, in its various Rules, defined a period of time as excluding Saturdays, Sundays and statutory holidays, it has done so only with respect to *its* Rules. Where there is no statutory qualification limiting the period to “working” days (see for example section 7(14) and 8(5) of the Act) the Board is inclined to give the words their normal meaning, that is, the period is one of ten “calendar” days.

9. This application having been filed beyond the ten day period following the request for an order pursuant to section 22 of Bill 136 and before the Board has issued such an order, would therefore appear to be untimely.

10. Having regard to the foregoing, this application is dismissed as untimely.

0879-97-U; 1141-97-R I.W.A. Canada, Local 1-2995, Applicant v. **Nighthawk Timber Company**, Responding Party; I.W.A. - Canada (Industrial, Wood and Allied Workers of Canada), Applicant v. **Nighthawk Timber Company**, Responding Party

Certification - Dependent Contractor - Employee - Union applying to represent employees of employer operating log harvesting and hauling business - Board finding owner-operator truck driver retained by employer to be “dependent contractor” and, therefore, employee within meaning of the Act

BEFORE: *Pamela Chapman*, Vice-Chair.

APPEARANCES: *James Fyshe, Bill Burke and Roland Laurin* for the applicant; *John Saunders, Don Stringer, Lori Thompson and Dave Stringer* for the responding party.

DECISION OF THE BOARD; April 1, 1998

1. Board File No. 1141-97-R is an application for certification. Board File No. 0879-97-U is a complaint pursuant to section 96 of the Act alleging violations of section 72 of the *Labour Relations Act, 1995* (“the Act”) by the responding party (“the employer” or “Nighthawk Timber”).

2. A representation vote in the application for certification was held on July 10, 1997. The ballot box was sealed pending the resolution of a number of outstanding disputes relating to the description of the bargaining unit and the status of several individuals as employees within the proposed unit.

3. Hearings were held on August 25, October 29, 30, November 4, 5, 6, 26 and 27, 1997. On November 27, 1997, the Board delivered an oral ruling on one of the status disputes, finding that William Burke (“Burke”) was a dependent contractor of Nighthawk Timber, and therefore an employee within the meaning of the Act. On December 11, 1997, the Board issued a written decision on the section 96 complaint concerning the termination of Burke by the employer, finding that the employer had violated the Act.

4. However, a number of matters remain outstanding, including the certification. The union is seeking automatic certification pursuant to section 11 of the Act as a result of the unfair labour practice, but argument has not yet been heard on whether or not this relief should be granted. It may be possible to count the ballots, as the parties are now that the bargaining unit will consist only of dependent contractors in the employ of Nighthawk, but eligibility to vote in this unit is unclear as the parties do

not agree on whether the Board's decision concerning the employment status of Burke applies to the other individuals still in dispute.

5. In this decision, therefore, I will provide fuller written reasons for the decision on status affecting Burke, in the hope that the parties may then be able to agree on the composition of the bargaining unit.

THE DECISION

6. The Board issued the following oral ruling on November 27, 1997:

Having had the opportunity to carefully review the written submissions made by the parties prior to the hearing in this matter, and the benefit of oral argument yesterday, I am satisfied that I can now issue a brief bottom-line oral decision on the question of whether or not William Burke is a dependent contractor within the meaning of the Act.

In all the circumstances of this case, I have concluded that Mr. Burke is a dependent contractor.

I will not at this time offer an exhaustive review of all of the factors that I have considered in reaching this decision, nor would such a recitation likely be helpful delivered orally. I will say, however, that in reaching this decision I have analyzed the facts established by the evidence as they relate to the definition of "dependent contractor" in section 1 of the Act, and with reference to the factors cited in the various authorities relied upon by the parties. While there were some conflicts in the evidence offered by the witnesses called by the two parties, I have not found it necessary to resolve any of these conflicts or to make findings relating to credibility in order to reach my conclusion on this question of status. Based on the evidence which was not in dispute, I am satisfied that at the relevant time Mr. Burke was in a position of economic dependence upon Nighthawk Timber, and was under an obligation to perform duties for the company, such that he more closely resembled the relationship of an employee than that of an independent contractor.

Further reasons will follow, in the final written decision issued in this matter.

THE FACTS

7. Nighthawk Timber is engaged in the business of harvesting and hauling timber in the Timmins forest, a tract of land south of Timmins. Background information about the company and its operations is set out in some detail in the decision dated December 11, 1997.

8. Nighthawk employs individuals to drive company-owned trucks (employee drivers) and also retains each year the services of other drivers who own their own trucks (owner-operators). The number of employee drivers and owner-operators varies depending on the season: during the peak season from October to April there are up to five owner-operators and four employee drivers. No employees work in the bush during the off season in April and part of May, during the spring break-up, and no owner-operators are kept on during this period.

9. Like other log harvesting and hauling operations about which I heard evidence, Nighthawk Timber generally retains the same owner-operators year to year. Occasionally an owner-operator chooses not to return because he is going to other work; sometimes there is a reduction in the number of owner-operators required during the peak season because of a change in the number or lengths of the hauls. Most years, however, the employer contacts its group of "regulars" at the end of the off-season and tells them when they can return to work, with the owner-operator who has hauled longest for the company starting work first and staying the longest in the spring.

10. Bill Burke began hauling for Nighthawk Timber in December 1991, and worked for them each season thereafter until the spring of 1997, when he was terminated as described in the decision on

the unfair labour practice complaint. When he began to work for the employer, he was the least “senior” of the owner-operators and therefore worked only the peak season. However, he quickly began to work the whole season, and was soon the most senior of the owner-operators. In or about the spring of 1994, Burke and Dave Stringer, one of the principals of Nighthawk Timber, entered into an agreement whereby Burke accepted a lower rate for hauling, in exchange for a guarantee that he would work the whole season each year.

11. Evidence was admitted concerning the proportion of Burke’s earnings which were earned at Nighthawk Timber in each of the years since 1993, which ranged from 80 to 92 per cent. Most of Burke’s earnings from other sources were earned during the two to three months during which he was effectively “laid off” from the company, although in some years he also had minimal earnings from other sources during the Nighthawk season.

12. In the off-season Burke generally did highway hauling, renting a trailer for this purpose as the trailer which he had purchased while working for Nighthawk Timber was designed for the hauling of logs of various lengths, and had very limited alternative uses. It was not disputed that the spring break-up affects the operations of all of the companies that haul timber in the area, so that there is very little work available in log hauling during the Nighthawk Timber off-season. Both employee drivers who are laid-off, and the owner-operators, are permitted to do other work during the off-season.

13. All of the drivers are also allowed to do other work outside their normal hours of work at Nighthawk. The company runs only one shift, days, from Monday to Friday (some other log hauling operations run evening, night and weekend shifts during the peak season). Drivers generally haul one load to Timmins and one longer haul to another mill, which fills their day, although there are exceptions depending on the time of year, the species which is being cut, and to some extent, the drivers’ wishes. Owner- operators are expected to work full-time on this shift for the length of time they are retained, which as noted above is the whole season for some, including Bill Burke, and fewer months for other less senior drivers. This commitment means that they cannot accept other daytime work on a day-to-day, or even a week-to-week, basis; they would have to “quit” work at Nighthawk Timber to do so.

14. The evidence discloses that Burke sometimes did other work during the season, including a few occasions when he ran his truck on a second shift, i.e. evenings, nights and/or weekends, for another log hauling operation during the peak season just before the spring break-up. Either he or his son drove the truck on these occasions. He also had a few opportunities to haul other cargo, such as large pipes. Finally, he was sometimes able to obtain “back-hauls” after delivering timber for Nighthawk to one of the mills outside of Timmins, which would result in income from another source. This is permitted by Nighthawk; indeed, at one time Nighthawk Timber would set-up back-hauls for its drivers and the owner-operators.

15. Both employee drivers and owner-operators are paid on a piece-work basis relating to the amount hauled. The rates paid are different, however, reflecting the fact that the company calculates the amount to be paid for particular types of loads (i.e. what species to what mill) having regard to an intended “hourly rate” which they presume, under normal circumstances, the drivers will be able to earn. The hourly rate from which the piece-work rate for employee drivers is calculated is \$21.00 per hour; the rate for owner-operators is much higher, generally around \$75.00 per hour. This reflects the fact that Nighthawk Timber is paying the owner-operators not only for their labour, but also for the use of their trucks.

16. Pay to employee drivers is subject to the usual deductions for CPP, EI and income tax, and they receive insured medical benefits paid for by the employer; Nighthawk pays Employer’s Health Tax on their behalf. The owner-operators are paid without deductions being made and are not covered

for medical expenses. They each receive bi-weekly statements called "Equipment Rental Summary-Hauling" which record the amounts payable for each haul completed during the period.

17. The document used for the retainer of owner-operators is called a "Hiring Agreement - Equipment Rental/Sub Contractor". Bill Burke signed these agreements in December 1991, October 1992 and June 1994. It appears, therefore, given that he also worked for Nighthawk in the seasons beginning in 1993, 1995 and 1996, that he may not have signed a new agreement on those occasions.

18. One of the questions asked on the Hiring Agreement form is whether or not the owner-operator has a WCB account and whether or not it employs other employees. At the bottom of the form, under "For Office Use Only", there is a spot to indicate whether or not WCB coverage is provided by Nighthawk, and whether or not a Certificate of Clearance (indicating that the owner-operators are covering WCB for their employees) is required. On the first form signed by Burke, in December 1991, there is a check beside "WCB covered by Nighthawk Timber Co. Ltd.". On subsequent forms the answer to this question is no.

19. Testimony on this issue disclosed that the employer did provide WCB coverage to Burke when he first began to work for Nighthawk. In the following season, however, the company asked him to sign a form claiming status as an independent operator in the trucking industry. This form was provided by the employer to the Workers' Compensation Board, and resulted in a determination that Burke was an independent operator within the meaning of the *Workers' Compensation Act* and therefore not required to be covered by the Act. The form, which was re-submitted in subsequent years, was filled out by Dave Stringer, and signed by him and by Burke. There is no doubt that many of the questions asked on this form about the nature of the relationship between Burke and Nighthawk bear some resemblance to the questions asked by the Board in making a determination of dependent contractor status under the *Ontario Labour Relations Act, 1995*. On the other hand, the information provided to the WCB is not the same as the evidence heard in this case, both because it is not nearly as extensive, and also because the answers permit characterization by the respondent. For example, on these forms Burke was described as performing "intermittent" work for Nighthawk Timber.

20. One matter about which the parties have different perceptions is the extent to which the owner-operators are able to negotiate the rates paid to them for different routes. It was not disputed that when a new route is established the company tries to work out an appropriate rate beginning from the intended "hourly" rate and then factoring in the distance travelled, the price for the wood, etc. There may be some discussion with one or more of the owner-operators about these calculations, but it is Nighthawk which sets the rate. On occasion, the owner-operators are unhappy with a route rate once they begin driving it, because, for example, it turns out that the driving times are longer than anticipated because of road or weather conditions. Similarly, an increase in fuel rates can have a big impact on the amount owner-operators earn. These complaints are brought to Dave or Don Stringer, the owners of the company, and they may or may not result in an adjustment to the rates. Generally, though, the rates are set by the company, and the owner-operators may work for some number of weeks before they even know what rate they are receiving.

21. As noted above, the employee drivers drive company-owned trucks, while the owner-operators all own (or lease) their equipment, including a truck and log trailer. Much evidence was called concerning the various responsibilities that owner-operators therefore assume relating to their equipment, including:

- (a) they insure the trucks and pay all premiums;
- (b) they decide on a maintenance schedule and pay for all maintenance and repairs. There was some evidence that the company might intervene if

an owner-operator attempted to drive a truck that was clearly in need of maintenance, in the interest of ensuring the safety of other drivers, including company employees, and protecting their own equipment on the bush roads;

- (c) they can purchase fuel and other supplies wherever they wish, although the owner-operators are provided with a card which allows them to buy fuel at the bulk rate negotiated by the company at certain locations. The cost of these fuel purchases is deducted from the payments made to the owner-operators by Nighthawk;
- (d) the owner-operators pay for and arrange appropriate licences, MTO permits such as long load permits and running rates for highway driving, and must have their own Commercial Vehicle Operators' Record; and
- (e) they pay their own tickets and fines for overloading.

22. There was some debate about the extent to which the company plays any role in the owner-operators' selection of trucks and/or trailers. In order to haul logs a driver must have a fairly specialized trailer, as noted above. There are different manufacturers of these trailers, however, and Nighthawk plays no role in determining what brand is purchased or leased by the owner-operator, or indeed whether they buy or lease. During the course of his work with Nighthawk Timber, Burke decided to buy a new log trailer, and he discussed this purchase with Dave Stringer. He testified that Stringer told him he should buy a trailer capable of hauling a greater variety of lengths of timber (a 10-bunk rather than a 6-bunk trailer). In his testimony Stringer agreed that this was a good idea, as it would increase the driver's flexibility in terms of taking loads and therefore the kinds and amount of work he could accept, and that he probably told Burke it was a good idea, but denied that he made any particular recommendation or suggested that it was a requirement of the job. Indeed, other owner-operators, including Burke's son, who purchased his old trailer when he replaced it, use a 6-bunk trailer to work for Nighthawk.

23. Similarly, Burke bought a new truck during the period he worked for Nighthawk, which he suggested had been selected specifically for work in log hauling. In fact, the "special" features the truck has, such as heavy-duty suspension, are useful for driving on rough bush roads hauling heavy loads but are not necessarily required for such driving, and have other applications as well. Burke also equipped the truck with a sleeping cab, an expensive option which has no use in log hauling but which would be useful for highway hauling. At the same time, though, it seems unlikely that Burke would have invested in the particular equipment he did, at great expense, if he had not been working regularly for Nighthawk doing log hauling.

24. Burke and the Stringers also disagreed about the extent to which owner-operators are permitted to establish their own schedules and hours of work, and to refuse particular work. The hours of work for the drivers are dictated to a large extent by the shift which the loader, a company employee, works, from 5:15 a.m. to about 5:00 p.m. The order in which trucks are able to pick up loads in the bush is also structured, at least during the peak season, by a schedule drawn up by the Stringers. However, this schedule was established at the request of the owner-operators, in order to minimize waiting time and avoid conflict between the drivers. Dave Stringer testified that the owner-operators nonetheless had certain choices they could make about how long and where they would work, including the opportunity to refuse particular loads, and to decline to take a second or third load. When cross-examined about this, he conceded that the drivers' discretion in this regard is limited by the companies' needs, so that load choice might be restricted by what product is being cut and what has been stockpiled, where the loader is working, whether mill quotas have been exceeded, and whether there is any urgency

in moving timber, such as at the end of the season. However, where possible, it seems that the company tries to accommodate an owner-operator who wants to take a load to a particular location because he has an appointment, for example, or who needs to finish early in order to meet another commitment.

25. Another issue on which the evidence was not entirely consistent was the ability of the owner-operators to use substitute drivers on their trucks. There was little evidence of substitutes being used, by Burke or by other owner-operators. Dave Stringer identified two owner-operators who had some years ago used replacement drivers, for an unspecified period of time. None of the current complement of owner-operators have apparently used substitute drivers, except for Burke, whose sons have driven his truck on occasion. Burke's testimony on this was essentially undisputed. He testified that about two years ago, for a few days when he was unable to report to work, his son Jeff, who now drives for Nighthawk, took Burke's truck without advising his father of his intentions and did the Nighthawk hauling. According to Burke, who did not know about this until after Jeff had done it, Jeff believed that Burke's job would be in danger if he didn't report to work. It appears that Dave Stringer may have observed Jeff driving the truck, but didn't question it as he knew Jeff and understood him to be a safe driver. Burke's son Jason also drove his truck, with Burke riding in the cab, when he was being taught how to haul logs by his father. Burke testified that he cleared this arrangement with the Stringers before taking Jason along, and that Dave Stringer said that it was OK as long as Jason didn't drive on the bush roads maintained by Nighthawk.

26. The Stringers testified that they had no objection to owner-operators using substitute drivers as long as the driver proposed was a safe driver. Dave Stringer agreed that it would be his decision as to whether or not a particular person was "safe". Most owner-operators have never asked to use a substitute driver, and no-one has ever regularly used one.

27. There was a dispute between Dave Stringer and Bill Burke about a conversation they had in the fall of 1995 about Jeff Burke starting to drive Burke's old truck for the company. When Burke spoke to Stringer he indicated that he was content to have Jeff drive for the company, but expressed some concerns about his doing so as an attachment to his father, stating that he wanted to deal directly with Jeff. Burke recalls that Stringer said that he would only permit Jeff to drive if he actually owned his own truck, as he didn't like to deal with drivers who were employed by someone else. Certainly Jeff did buy Burke's old truck from him and began to deal directly with the Stringers as an owner-operator. Stringer disputes ever having suggested that this was a requirement for having Jeff drive. Having carefully reviewed the evidence on this discussion, I am satisfied that the differences in their testimony reflect a misunderstanding between them which is not central to the decision.

28. The Stringers have generally exercised some control over the owner-operators around issues of safety, which is consistent with their obligations to sub-contractors pursuant to the *Occupational Health and Safety Act* ("the OHSA"). When new owner-operators begin with the company, Nighthawk provides "safety indoctrination" which includes provision of a safety book. If a driver is known to them, he may only be asked to drive into the bush behind another truck to become familiar with the route and road conditions, but a less familiar individual may be asked to ride in the cab with a company driver for his first trip into the bush. Owner-operators, like the employee drivers, are subject to monthly safety audits as required by the OHSA. However, owner-operators, unlike employee drivers, are not required to attend meetings about safety and other trucking issues offered by agencies such as the Ministry of Transportation, although Nighthawk permits them to take time off to attend such meetings and has offered to make transportation arrangements to facilitate their attendance.

29. Finally, evidence was heard about the way in which Bill Burke structures his affairs to take advantage of tax and other benefits of self-employment. There is no question that he treats his income from Nighthawk, and other companies for which he works, as self-employment income and that he

incurs certain expenses relating to the running of his truck which he claims against his income. It does not appear, however, that he engages in any significant promotion of his services, other than having his name on the side of his truck.

REASONS

30. The question which the Board has decided is whether or not Bill Burke is a dependent contractor within the meaning of section 1(1) of the Act, which contains the following relevant sub-sections:

1. (1) In this Act,

“dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

“employee” includes a dependent contractor.

31. There is no question, having regard to the facts as detailed above, that Burke has in fact been dependent on Nighthawk Timber to a significant extent since at least 1993. During these years he worked almost exclusively at Nighthawk for 9 to 10 months of the year, or 75% to 85% of his time, during which period he made between 82% and 92% of his annual income. However, these facts do not end the inquiry as to dependent contractor status, for in order for a contractor to be found an employee within the meaning of the Act this dependency must flow from the terms and conditions of the relationship with the employer, rather than being a matter of choice for the contractor.

32. In *Algonquin Tavern*, [1981] OLRB Rep. August 1057, the Board set out a number of factors which, alone or in combination, have been considered in assessing dependent contractor status. Both parties referred to this list of factors, and I will briefly review their application to the facts of this case.

33. *Use of substitutes*: the right to use a substitute for one’s own work is generally considered inconsistent with status as an employee, if substitution is the employee’s decision. There was no evidence that the current owner-operators use substitutes, other than the evidence of driving by Burke’s sons in fairly unique circumstances. In any event, owner-operators would not have complete discretion over the use of substitutes as the Stringers maintain the right to prohibit the use of a driver they do not feel is a “safe driver”.

34. *Ownership of tools*: owner-operators own their own trucks, trailers, and related equipment such as tools for maintenance, while the employee drivers drive company-owned rigs.

35. *Entrepreneurial Activity; Selling Services to the Market Generally; Economic Mobility and Independence*: I will deal with these three factors together as they relate to each other in terms of the facts of this case. The central fact relating to Burke’s position in the market, and indeed to all of the owner-operators, is that they are required to make a substantial commitment to Nighthawk, which restricts their ability to accept work elsewhere, in order to receive any work from the employer. In Burke’s case, as the most senior owner-operator, he has entered into an arrangement with the company whereby he receives a full season of work, full-time, five days a week. In order to get this work he must commit to work on this full-time basis for the full-season: he cannot leave day-to-day or week-to-week in order to take other work, even if the other prospects are more lucrative in the short run, without in effect “quitting” his job at Nighthawk with no guarantee of further work from them. Other owner-operators may work a shorter season than Burke, but they are still required to make the same

commitment within the period of work they are offered. It is also important to note that in this industry “full-time” during the peak season often means 60 hours per week, which is close to the legal limit. In these circumstances, opportunities for the owner-operators to sell their services to the market generally are actually quite limited, other than in the off-season when there is little work in log-hauling.

36. While there are many companies engaged in log-hauling in Timmins and the surrounding areas, it is also not fair to suggest that there are numerous purchasers for the services of owner-operators in the way this factor is discussed in *Algonquin Tavern*. Because all of the main companies that compete with Nighthawk retain regular drivers in much the same way, including a rough “seniority” system, there is a pattern of long-standing, fairly consistent relationships with a limited number of purchasers, which mitigates against much movement of owner-operators during the season. Indeed, Dave Stringer conceded that if Burke left Nighthawk during the season he would not be able to get regular work elsewhere as a log-hauler.

37. Certainly owner-operators assume some risks indicative of entrepreneurial activity, relating in particular to the acquisition of expensive capital equipment. When they drive a particular route, their profit margin will be affected by factors beyond their control, like the weather, waiting times at the mill, break-down of their vehicle, etc., and will also be affected by choices they make such as maintenance of their vehicle. On the other hand, decisions made by the owner-operators about their capital equipment are undoubtedly influenced by their commitment to Nighthawk and their apprehension of the employer’s requirements, as demonstrated by Burke’s choice of a truck that would wear well on the bush roads and a trailer that would permit him to carry all of the types of product cut by Nighthawk. In that sense the risks assumed by the owner-operators relate to their dependency, as Burke learned when he was terminated by the company and ended up selling his log trailer and purchasing a trailer suitable for highway hauling.

38. There was little evidence of promotional activities by Burke, other than his name appearing on the side of his truck, but he did make efforts to get additional work from other companies from time-to-time.

39. The company pointed to its willingness to accommodate owner-operators in their choice of loads, where possible, as evidence of economic mobility and independence. The ability to refuse a particular load is not of much use, however, where the operator cannot generally refuse work so as to accept other work, as described above.

40. *Variation in fees charged:* there are no formal negotiations of the rates paid to owner-operators, which are not contained in their hiring agreements, and are not even always discussed with the drivers until some weeks after they start work for the company. Where there has been negotiation of a sort over the owner-operators’ desire to have a rate increased due to a change in conditions, for example, there is little difference between these discussions and those which might be held between employees and their employer over a wage increase.

41. *Integration into employer’s operations:* the owner-operators are fully integrated into a critical part of Nighthawk’s operations, the hauling of timber, and as discussed above their relationships are generally stable and of long duration, with most of the same drivers returning season after season. In *Algonquin Tavern*, *supra*, the Board noted that even a short engagement may demonstrate integration if the employee “is required to devote the **whole** of his working time during the period to the service of the employer”.

42. *Degree of specialization, skill, expertise or creativity required:* there was no suggestion that the qualifications required for the position of owner-operator differed from those of the employee drivers, or would be inconsistent with employment status.

43. *Control of manner and means of performing the work:* in *Algonquin Tavern, supra*, the Board notes that it is the right to interfere with the performance of work, rather than the ability to do so, which is of significance. Similarly, it is not significant that an employer does not generally interfere with the operations of a contractor so long as the right to do so is retained by the contract between them. In the present case, the evidence suggests that Nighthawk is not generally involved on a day-to-day basis with the operations of the drivers, in the sense that they work from an established schedule and do not require regular direction to complete their assignments. However, the same would appear to be true for the employee drivers, and the work performed by both types of drivers is certainly structured by the company through the hours of work of the loader, the scheduling of runs, the decisions about routes, the contracts entered into with the various mills and Nighthawk's involvement on safety issues. It is significant that in Burke's case the company took an essentially disciplinary approach to dealing with him over their concerns about his attitude (as detailed in the decision on the section 96 complaint), and seemed to be of the view that they could terminate him at will.

44. *Contract amount, terms and manner of payment:* owner-operators are paid more than employee drivers, which reflects their provision of a truck and trailer, and there are no deductions made from their pay. However, all the drivers are paid on a piecework basis, which reduces the significance of this manner of payment. The hiring agreements used for owner-operators do not contain any provision for termination of the agreements, such as a notice provision, nor any provision for the term of the agreements or the volume of work to be completed.

45. *Similar conditions to employees:* it is significant that owner-operators and employee drivers both do the same work for Nighthawk Timber, essentially side-by-side (to the extent that any truck drivers work in concert). There are some differences in the way they are treated by the company, as detailed above, but there are as many similarities, some of them significant: during the season they work the same hours; they are required to make the same kind of commitment to the employer during the season, and are all "laid-off" during the spring break-up; they can moonlight to the extent that their hours permit during the season, and can look for other work to fill the off-season (indeed, the laid-off employees are presumably required to search for work during this period if they wish to collect EI benefits).

46. On balance, it is clear that most of the factors discussed in *Algonquin Tavern, supra*, point to a relationship of dependency between Burke and Nighthawk. Indeed, the only factor which points clearly to independence, the ownership of tools, cannot be decisive in a determination of employee status, given that the definition in the Act specifically contemplates ownership of tools by dependent contractors.

47. The employer relied upon the Board's decision in *Atway Transport*, [1989] OLRB Rep. June 540, the only case to date in which the Board has considered the employee status of drivers in the log-hauling industry. This decision was made in the context of a complaint of an unfair labour practice arising from the termination of a "hauling contractor" named Edward Kidd, whom the union claimed was an employee and the company characterized as an independent contractor. Atway hauled logs to mills under contract to a timber broker and unlike Nighthawk Timber did no cutting of its own. It was also a significantly larger operation, using 100 trucks operated by contractors and another 50 trucks owned by the timber broker and operated by up to 80 drivers hired as employees by Atway.

48. Perhaps because of its size, or because of different market conditions at that time, Atway had quite a different experience than Nighthawk in the use of what we have called "owner-operators". As discussed at paragraphs 8 and 28 of the *Atway Transport* decision, the company was always looking for more such contractors and had a great deal of difficulty in keeping enough of them on board: in the 1987 season examined in the decision it had to hire more than 50 contractors in order to maintain 20 to

25 operator-owned trucks hauling for the company in the Sioux Lookout area. These contractors are described in the decision as having had “high mobility and propensity to shift from haul to haul”, and the Board found that (at paragraph 28):

there is a chronic shortage of contractors in northwestern Ontario and the contractors move about that area quite freely, seeking the best rates and hauling conditions...[and] If contractors think that a better haul is available elsewhere, they will leave for a month, a week or two, or even a few days....Contractors do not generally contact the respondent when their trucks break down or when they decide to haul for another firm.

49. It appears that there was also a more formal process for negotiating rates with contractors in place at Atway, as described at paragraph 30 of the decision, including meetings between management and spokesmen for the contractors. The Board noted that contractors who were unhappy with the rate negotiated for a particular haul would generally stop working it. However, as noted elsewhere in the award, at paragraph 28, contractors who chose not to work a particular haul or to leave for some period to haul elsewhere generally returned to haul for Atway at a later time, and the company took no disciplinary or other adverse action against them, even if they left without advising the company of their intentions.

50. The evidence in Atway about the company’s involvement in enforcing safety standards for drivers can also be distinguished from the evidence in the present case. At paragraph 33, the Board describes an effort by representatives of the industry to improve safety in log-hauling, which included a recommendation that any driver on company-owned or contractor-owned trucks have a valid classified licence. This recommendation was not implemented, however, as the contractors refused to provide such information on the basis that it was no business of the companies who was driving the contractors’ trucks.

51. Kidd began to haul for the company at the end of 1996. He first ran his truck on a double-shift, driving it himself during the night and hiring someone else to drive it during the day. The evidence before the Board was that the decision to have another driver on the truck was entirely that of Kidd and that the company had no input at all into the choice of driver.

52. Like the owner-operators in the present case, Kidd was paid based on the volume of wood delivered to the mill. Company drivers working for Atway, however, were paid a set amount per trip regardless of the volume of wood hauled.

53. Another interesting consideration in the *Atway Transport* case is the fact that Kidd had worked only one season for the company, from December 1996 until September 1997, prior to the consideration of his status, which limited the extent to which the Board was able to identify any pattern of dependency arising from his relationship with the company. While noting that Kidd hauled almost exclusively for Atway during this period which would generally be suggestive of economic dependence, the Board concluded (at paragraph 50), that “the fact that this was a matter of choice rather than necessity dictated by the circumstances of the industry or the terms of his contractual relationship with the respondent substantially reduces the determinative value of that fact in the instant case”. Similarly, the Board noted at paragraph 53 that Kidd was “under no obligation to devote all or any specified amount of his hauling time to the service of the Company”. Ultimately, the Board in *Atway* concluded that several major factors pointed to independence rather than dependence, and that Kidd was not a dependent contractor within the meaning of the Act.

54. There was evidence before the Board in *Atway Transport* about the Workers’ Compensation Board’s treatment of trucking contractors at that time, which is interesting given the evidence heard in this matter. In 1989 it appears to have been the WCB’s policy to treat all trucking contractors in the logging industry as employees if they were the only operator of the vehicle, and as employers if they

paid someone else to drive the vehicle. The decision notes that this policy was under appeal by Atway Transport at that time. The documents entered into evidence in this case suggest that the WCB has changed its approach since 1989, treating single operators as independent contractors rather than employees so long as they provide certain information to support that status. It is clear that the Board did not give significant weight to the approach of the WCB noted in *Atway Transport, supra*, in determining the status of the contractor drivers. Similarly, I do not think it appropriate to give much weight to the WCB's determination of Burke's status in the present matter. As noted above, the WCB relies only upon the answers to particular questions set out on the form completed by Burke at the behest of Nighthawk, to determine whether or not a truck driver is an independent operator as that term is defined under the *Workers' Compensation Act*. While there is some overlap between the factors they appear to consider, and those canvassed in the present decision, they are not congruous, and in any event I was not inclined to prefer the hearsay declarations contained in the forms to the evidence I heard in the course of these proceedings.

55. I was satisfied, therefore, having carefully reviewed the facts as they are outlined above and having regard to the factors set out in *Algonquin Tavern, supra*, that William Burke was, prior to his termination, in a position of economic dependence upon and under an obligation to perform duties for Nighthawk Timber, and that this dependency arose from the terms and conditions of the contractual relationship between them. The facts in the present case can be distinguished in important respects from those outlined by the Board in *Atway Transport, supra*, where a high degree of independence was found based in large part upon high daily and weekly mobility, with no commitment to work being required of the drivers, and virtually no control being exercised over their operations. Those facts are simply not present in the arrangements between Burke and Nighthawk, and indeed there is overwhelming evidence to the contrary.

56. As noted above, there is no agreement between the parties that the results of this determination will apply to the other owner-operators working for Nighthawk, so their status remains unresolved. I have tried to note carefully in my review of the facts, and throughout my analysis of the problem, where the evidence was restricted only to Burke's situation and where it described more generally Nighthawk's approach to dealings with all the owner-operators. Frankly, much of the evidence was of this more general nature and so should be of some assistance to the parties, as it would be to the Board, in determining the employment status of the other challenged individuals. However, evidence of the amount of work performed for other employers related only to Burke, and the evidence revealed that different drivers will have worked varying lengths of time for the company each year, depending on their length of service and perhaps other factors such as availability. I trust the parties will now be able to review the facts as they relate to the other drivers and reach a conclusion as to whether or not the assistance of the Board will be required in order to resolve the outstanding status disputes.

57. The parties are therefore directed to advise the Board, after they have reviewed this decision, whether or not further hearings are required, and if so, how many days should be scheduled and what issues remain to be resolved. Should the parties decide that a count can be taken of the ballots of those agreed to fall within the bargaining unit, they should contact the Manager of Field Services and ask that a count be scheduled prior to any further hearings.

58. This panel will continue to remain seized.

3333-97-JD Labourers' International Union of North America, Local 1059, Applicant v. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 736, **Ontario Hydro**, Electrical Power Systems Construction Association, Responding Parties

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Responding parties objecting to "reply brief" filed by applicant on eve of consultation - Board dismissing objection - Labourers' union and Ironworkers' union disputing assignment of work in connection with cleaning, installing and pre-tensioning of spin lock anchor bolts set in concrete in reactor vault at Bruce Nuclear Power Development - Board declaring that disputed work ought to have been assigned to members of Labourers' union

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. Knight* and *G. McMenemy*.

APPEARANCES: *Carolyn Hart*, *Bill Casemore* and *Clayton Bell* for the applicant; *Gary Caroline*, *T. Armstrong* and *D. Keip* for the International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 736; *Jennifer Wooton Regan* and *Rick Currie* for EPSCA; *Jennifer Wooton Regan*, *Jim Scattergood* and *Walter Winiarski* for Ontario Hydro.

DECISION OF THE BOARD; April 27, 1998

1. This is an application regarding a work assignment filed with the Board in accordance with section 99 of the *Labour Relations Act, 1995* (hereinafter "the Act"). This proceeding was scheduled for an oral consultation before this panel of the Board on April 16, 1998.

2. At the outset of the consultation, the Board raised with the parties the issue of whether they were content to proceed with Board Member Knight as one of the three persons on the panel of the Board determining this matter, given his previous employment with Ontario Hydro. The Board indicated that it was prepared to recess for a brief period in order to permit counsel to seek instructions from their respective client or clients. However, all counsel advised the Board that their clients were not objecting to Mr. Knight's participation in this proceeding, and accordingly the consultation continued.

3. Immediately thereafter, the Board dealt with a motion brought by counsel for Ontario Hydro and the Electrical Power Systems Construction Association (the latter entity to be referred to hereinafter as "EPSCA"). Counsel, supported in the circumstances of this case by counsel for International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (hereinafter "the Ironworkers"), objected to the reply brief filed by counsel for the Labourers' International Union of North America, Local 1059 (hereinafter "the Labourers'"). In essence, the objection was that the reply brief had been faxed to opposing counsel on April 7, 1998, and had not been received in its entirety until April 9, 1998, which was the last working day before an extended Easter weekend. It was submitted that the lack of time precluded Ontario Hydro and the Ironworkers from investigating and obtaining information upon certain allegations of fact raised in the reply brief. In those circumstances, counsel for Ontario Hydro, EPSCA, and the Ironworkers asked the Board to rule that the Labourers' be precluded from relying upon its contents.

4. After hearing submissions from the parties, the Board indicated that we were unwilling to preclude the Labourers' from utilizing the materials filed with the Board contained in its reply brief. Although the reply brief was delivered to the parties and filed with the Board quite close to the time of the consultation, there was no suggestion that this was effected to obtain a strategic advantage. Rather, it would appear that Labourers' counsel's work schedule was the main cause of the delay in filing the

materials. In the end result, it appeared to us to be somewhat artificial for the Board to pretend that the information contained in the reply brief (consisting of declarations of individuals and comment upon the opposing parties' materials) was not before us. Certainly, it was well within the right of counsel for the Labourers' to comment upon the materials filed by opposing parties in any event, and it did not seem to be particularly constructive to spend the day parsing through the document to "pick out" that which might be objectionable.

5. Accordingly, we provided Ontario Hydro, EPSCA and the Ironworkers with the option of either a short recess to obtain the necessary information to respond to the specific statements made in the Labourers' reply brief (if that information could, in fact, be obtained relatively quickly), or an adjournment to obtain such information and to file it with the Board. After a five minute recess, both counsel for Ontario Hydro and EPSCA, and the Ironworkers, advised the Board that they were content to proceed, if each would be allowed to add statements where appropriate in response to the materials filed by the Labourers'. This was satisfactory to the Board and to counsel for the Labourers', and the consultation proceeded on that basis.

6. There was some disagreement regarding the words to be used to describe the work in dispute in this proceeding, although there was no dispute at all regarding the actual physical actions and materials required to perform the work. We are satisfied that the work in dispute can be fairly described thusly:

the cleaning, installing and pre-tensioning of spin lock anchor bolts set in concrete in the unit two reactor vault at the Bruce Nuclear Power Development.

We note here that during the course of argument, counsel for the Labourers' limited her client's claim for work to those anchor bolts which contain a locking device and are of diameter one and seven-eighths inches and greater. Accordingly, the words "anchor bolts" set out above should be read in that context.

7. Some background is helpful here. The work in dispute formed part of a radiation containment project at the unit two reactor vault at the Bruce Nuclear Power Development. The project involved the installation of isolation bulkheads and shielding slabs over top of the fuel ducts on either side of the reactor. The work in dispute was not part of a mark-up meeting held in July, 1996, as it had not been anticipated as at that date that the specific work in dispute would be necessary. However, during the course of the project Ontario Hydro determined that the original steel base plates could not carry the load of the isolation bulkheads, and therefore that structural steel base plate extensions would be required under the bulkheads. In other words, Ontario Hydro had to add steel to the existing steel base plates in order to provide a larger surface over which the load could be spread.

8. The structural steel initially installed as base plates was supported by anchor bolts embedded into the concrete foundation. To support the base plate extensions, 27 anchor bolts (of varying length and of diameters of either 1 7/8 inches or 2 inches) were placed in holes drilled into the concrete foundation. These holes were between five and one-half and seven feet deep, and three and one-half inches wide. The base plate extensions sit on top of the anchor bolts thus dissipating the weight of the bulkheads into the concrete foundation. The work of drilling and vacuuming the holes for the anchor bolts was assigned to members of the Labourers', as was the grouting of the anchor bolts into place. None of that work is in dispute in this proceeding.

9. Each of the anchor bolts has a locking device on the bottom of the rod which expands when the bolt is tightened in order to ensure that the bolt is secured in place. The locking device consists of a cone which is set below an expansion shell. The bolt, when torqued to a specified setting, causes the

cone to move into the shell, and expands the anchor device against the sides of the hole, thus securing it.

10. Members of the Ironworkers were assigned the work of cleaning the anchor bolts, installing the bolts and pre-tensioning of the bolts. The latter function required the use of a tensioning tool (a hydraulic jack) to maintain a stated pressure on the bolt in order to ensure that it could withstand that pressure. Once it was established that the pressure could be maintained, the anchor bolt nut was tightened, and the previously established pressure was maintained and transferred to the bolt. It was at this stage that the grouting was performed by the Labourers'. Ultimately, the Ironworkers manually rigged the base plate extensions into place on top of the bolts and aligned the plates with the existing structural steel. The base plates were then welded to the steel.

11. When determining a jurisdictional dispute complaint, the Board considers all of the factors relevant to the proper assignment of the work. As a general observation, the Board has historically given consideration to certain factors including the following:

- (a) employer practice and preference;
- (b) area practice;
- (c) trade agreements;
- (d) collective agreement obligations;
- (e) trade union constitutions;
- (f) skill, training and safety; and
- (g) economy and efficiency.

In any particular case, one or more of these factors may be of special significance, and will be given greater weight than other factors.

12. In this proceeding, it is evident that the respective EPSCA collective agreements binding Ontario Hydro are worded in such a manner as to ground a jurisdictional claim by either trade to the work in dispute. Accordingly, that factor is neutral.

13. Article IV of the Constitution of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers claims jurisdiction for its members over the "fabrication, production and or erection and construction of all ... anchors", which claim is not made by the Labourers' in its Constitution. Accordingly, this factor falls in the favour of the Ironworkers.

14. The parties addressed the question of skill, training and safety, and economy and efficiency in their written briefs and in their oral submissions. In our view, members of both trades have sufficient skill and ability to perform the work in dispute safely. Furthermore, each trade makes out a legitimate argument for the proposition that the assignment of the work to members of its trade would be more economical and efficient. In our view, these factors favour neither trade.

15. The key factor in this proceeding is that of employer practice. The theory of Ontario Hydro, EPSCA and the Ironworkers is that the employer's practice is to assign the cleaning and installation of anchor bolts to the trade whose work or equipment the bolts are to support or to hold in place. Accordingly, in a project such as the one in question, where the anchor bolts are to be used in connection with work being performed by members of the Ironworkers, the work of installing the anchor bolts was properly assigned. Similarly, the cleaning of the anchor bolts was assigned to the trade installing them - members of the Ironworkers. The theory of the Labourers' case is more stark - that its members have been assigned the cleaning and installation of anchor bolts by Ontario Hydro in the past, and that the work in dispute was misassigned in this case.

16. The employer's practice evidence relied upon by the Ironworkers and by Ontario Hydro and EPSCA was identical. The evidence establishes, in general terms, that the trade responsible for the structure the bolts were being used to fasten would be assigned the cleaning, installation and pre-tensioning of the anchor bolts used. Some of the materials filed are of many years vintage, and it is not possible to determine the particulars of the work performed which is said to be similar to the work in dispute before the Board. To some extent, therefore, it is necessary to make an "educated guess" based upon the materials filed. Ontario Hydro and EPSCA assert that when "rock bolts" were utilized, Ontario Hydro's past practice was to assign the work to members of the Labourers'. Ontario Hydro and EPSCA define the term "rock bolt" to mean an anchor bolt "installed directly into solid rock to fasten other structures (including structural steel or concrete slabs) to the rock". It is the position of Ontario Hydro and EPSCA that the practice material relied upon by the Labourers' reflects the installation of rock bolts, and therefore is of no relevance. The Ironworkers' submit that the evidence filed by the Labourers' reflects its theory of the case - that the bolts typically secured something against concrete or rock, a material or substance within the jurisdiction of the Labourers'.

17. Having reviewed all of the materials, and having considered all of the submissions of the parties, we are not satisfied that the universality of the employer practice defined by the Ironworkers or Ontario Hydro and EPSCA has been established. Much of the Labourers' practice evidence is consistent with the theory relied upon by the Ironworkers, Ontario Hydro and EPSCA. However, it is also consistent with the theory of the Labourers' - that the installation of "small" anchor bolts is assigned to the trade responsible for the material to which the bolt is attached.

18. There is one rather vivid exception to the practice relied upon by the Ironworkers, Ontario Hydro and EPSCA. In 1988, Ontario Hydro performed rehabilitation work on a stairway and elevator tower at the Bruce Heavy Water Plant. The work involved the installation of approximately 130 to 160 anchor bolts, each up to 30 feet in length. It would appear that there was some urgency connected to this work, as the anchors initially installed had come loose, and the assignment of the work was made in the field rather than by way of a formal mark-up meeting.

19. The Labourers' relied heavily on the assignment of work on this project. Counsel for the Ironworkers conceded during the course of the consultation that the anchor bolts were 30 feet long, were rigged by ironworkers, and were torqued by members of the Labourers'. The Labourers' materials establish that an ironworker signalled the crane operator. It was further submitted that members of the Ironworkers continued on with the steel work after the anchor bolts were installed. Counsel for the Ironworkers argued that little weight could be placed on the assignment because it was made in the field, and because of the urgency inherent in the work. In the alternative, counsel indicated that his client would "take its lumps" on this project and rely upon the other practice before the Board.

20. During the course of argument, counsel for the Labourers' asserted that members of the Labourers' inserted the rod into the holes at the Bruce Heavy Water Plant Rehabilitation project. Counsel for the Ironworkers disagreed, saying that this was, in fact, in dispute - that his client took the position that its members performed the installation of the anchor bolts.

21. The majority of the materials relied upon by the Labourers' regarding this project are contained in its reply brief. Accordingly, based on the process agreed upon earlier in the consultation, we have accepted the statement of fact asserted by counsel for the Ironworkers at face value. That being said, we are of the view that the weight of the evidence leads us to the conclusion that members of the Labourers' in fact guided the anchor bolts into the holes at the Bruce Heavy Water Plant Rehabilitation project.

22. First, Mr. Casemore in his declaration indicates, at paragraph 6, that Mr. Denis Keip (in attendance at the consultation on behalf of the Ironworkers) acknowledged in July, 1997 (the year is

incorrectly typed on the declaration but it can only be 1997) that members of the Labourers' had installed the anchors at the Bruce Heavy Water Plant Rehabilitation project. Additionally, the declaration of Mr. Rock (who states that he was involved in the installation of the anchor bolts in 1988) asserts that the rigging of the bolts was performed by ironworkers, and that "a labourer guided the rock anchor into the drilled hole", and torqued the bolt. He also notes that the anchor bolts were used to support structural steel stairways and elevator shafts. Finally, we note the written statement of Mr. Barat Twolan, a retired senior construction technician at Ontario Hydro, who (in some detail) laid out the work performed at the Heavy Water Plant in 1988. With regard to the installation of the anchor bolts, Mr. Twolan states that "the labourer guided the anchor into the drilled hole to the required depth ...". On top of all of this, no one disputes that members of the Labourers' torqued the anchor bolts.

23. On the basis of these materials, we are satisfied that members of the Labourers' performed the work of installing the anchor bolts on the Bruce Heavy Water Plant Rehabilitation project in 1988. We also observe that the first reference to this project was contained in the Labourers' initial brief filed with the Board, and that neither Ontario Hydro, EPSCA, or the Ironworkers specifically responded in their response briefs to the allegation that members of the Labourers' *installed* the rock anchors.

24. This evidence of employer practice is particularly important for two reasons. First, it is evident that it is the only project of the same magnitude as the work at the unit two reactor in question. Secondly, it appears to contradict the theory espoused by the Ironworkers, Ontario Hydro and EPSCA that Ontario Hydro has consistently and universally assigned the work of installing and pre-tensioning anchor bolts to the trade responsible for the structure the bolts were being used to fasten. At the Bruce Heavy Water Plant Rehabilitation, the anchor bolts were utilized to fasten structural steel stairways and to support elevator shafts. On the theory of Ontario Hydro, EPSCA and the Ironworkers, the work would have been assigned to members of the Ironworkers. It was not. There is absolutely nothing before the Board to suggest that the Ironworkers claimed the work, or that a separate arrangement was reached between the parties for this particular work at the Bruce Heavy Water Plant Rehabilitation project. In fact, the Ironworkers concede that members of the Labourers' torqued the anchor bolts. Field assignment or not, the work was assigned to members of the Labourers' and there is no suggestion that the Ironworkers' had any difficulty with that assignment.

25. All of this leads us to conclude that the employer practice reflected by the materials relied upon by Ontario Hydro, EPSCA and the Ironworkers is not sufficiently similar to the work in dispute to accord it determinative weight. The work reflected by that material is of much less significance and is, in our view, to be given subordinate weight to the evidence relating to the Bruce Heavy Water Plant Rehabilitation work in 1988. In the result, we are of the view that the employer practice evidence falls in favour of the Labourers'.

26. Furthermore, we are satisfied, on the materials before the Board, that the employer's practice regarding the cleaning of anchor bolts is to assign that work to the trade that installs the anchor bolts. This is reflected by a number of the mark-up meeting records and makes intuitive sense.

27. Not surprisingly, there was very little evidence of other practice for similar projects in Board Area 3. Area practice - except as it may be reflected in employer practice - favours neither trade.

28. Accordingly, considering all of the factors typically taken into account by the Board, these factors are all neutral with the exception of the Constitution factor (which favours the Ironworkers) and that of employer practice (which favours the Labourers'). The latter evidence must take precedence over the former. In the result, we are satisfied that the evidence before the Board establishes that the work in dispute - being the cleaning, installation and pre-tensioning of spin lock anchor bolts (as

defined in paragraph 6 above) set in concrete in the unit two reactor vault at the Bruce Nuclear Power Development - ought to have been assigned to members of the Labourers'. We so declare.

4532-97-M; 4533-97-U Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers, Jerry Coelho, Tom Oldham, Kerry Wilson, Danilo Buttazzoni, Luigi Scodellaro and John Haggis, Applicants v. International Union of Bricklayers and Allied Craftworkers and John T. Joyce, Responding Parties

Certification - Construction Industry - Interim Relief - Intimidation and Coercion - Remedies - Unfair Labour Practice - Trusteeship - International union placing Ontario Provincial Council ("OPC") under trusteeship - Trusteeship imposed following request by OPC to Minister of Labour to remove International union from designation of employee bargaining agency and application to Board by OPC under section 154 of the Act to be certified to represent provincial bargaining unit (and to thereby displace the designated employee bargaining agency which includes the International union) - OPC alleging that trusteeship violating various provisions of the Act, including Bill 80 provisions, and seeking interim relief - Board making interim order directing International union to cease and desist from interfering with unfair labour practice proceeding or with section 154 application before the Board - Board directing International union not to interfere with OPC's right to retain or instruct counsel or to extend funds for that purpose from monies paid to OPC or Ontario locals - Board also directing that collective bargaining proceed, as it has in the past, in accordance with OPC constitution, without interference by trustee or International union

BEFORE: *R. O. MacDowell*, Chair.

APPEARANCES: *Lorne Richmond* for the applicants; *Don Eady* for the responding parties.

DECISION OF THE BOARD; April 2, 1998

1. To make this decision easier to read, the institutional applicant, the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers, will be referred to as "the OPC", and the institutional respondent, the International Union of Bricklayers and Allied Craftworkers, will be referred to as the "American parent union".

I - Introduction: What this case is about - in general

2. This is an application for "an interim order" that is sought in connection with ongoing applications under section 154 of the *Labour Relations Act* (Board Files 3519-97-R and 3520-97-R), and a more recently filed unfair labour practice complaint. Both of these matters ("the main applications") are currently pending before the Board, so it may be useful to briefly describe what these cases are about.

*

3. The section 154 application was filed by the OPC in December 1997, and came on for hearing before the Board (differently constituted) on February 17, 1998. Sections 153 and 154 of the Act read as follows:

153. (1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;
- (b) despite an accreditation of an employers' organization as the bargaining agent of employers, designate employer bargaining agencies to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

(2) Where affiliated bargaining agents that are subordinate or directly related to the different provincial, national or international trade unions bargain as a council of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection (1), and subsection 162(2) shall not apply to such exclusion.

(3) Where a designation is not made by the Minister of an employee bargaining agency or an employer bargaining agency under subsection (1) within 60 days after October 27, 1977, the Minister may convene a conference of trade unions, councils of trade unions, employers and employers' organizations, as the case may be, for the purpose of obtaining recommendations with respect to the making of a designation.

(4) The Minister may refer to the Board any question that arises concerning a designation, or any terms or conditions therein, and the Board shall report to the Minister its decision on the question.

(5) Subject to sections 154 and 155, the Minister may alter, revoke or amend any designation from time to time and may make another designation.

(6) The *Regulations Act* does not apply to a designation made under subsection (1).

154. (1) During the period between the 120th and the 180th days prior to the termination of a provincial agreement, an employee bargaining agency, whether designated or not, may apply to the Board to be certified to represent in bargaining a provincial unit of affiliated bargaining agents.

(2) Where the Board is satisfied that a majority of the affiliated bargaining agents falling within the provincial unit is represented by the employee bargaining agency and that the majority of affiliated bargaining agents holds bargaining rights for a majority of employees that would be bound by a provincial agreement, the Board shall certify the employee bargaining agency.

4. As will be seen, section 153 allows the Minister of Labour to “*designate*” an “employee bargaining agency” for the purposes of the provincial ICI bargaining scheme. Under section 153, *designation* occurs at the instance of the Minister.

5. Section 154 provides a means by which an “employee bargaining agency” can apply for “*certification*” as the representative of a provincial unit of affiliated bargaining agents. A section 154 application is initiated by an aspiring applicant.

6. The Board has already ruled that the OPC is an “employee bargaining agency” within the meaning of section 151 of the Act, so that the OPC is entitled to bring an application under section 154. As I understand it, what remains to be determined is whether the other requirements for “*certification*” have been met - which is to say, whether the OPC can demonstrate sufficient local and membership support to warrant certification.

7. I will have more to say later about how the section 154 case unfolded before the Board.

*

8. The unfair labour practice complaint was filed by the OPC (along with the other applicants herein), on February 26, 1998. That complaint alleges that the American parent and its officers and agents, have breached sections 76, 87(2) and 149 of the *Labour Relations Act*. Those sections provide:

76. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

* * *

87. (2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

* * *

149. (1) A parent trade union or a council of trade unions shall not, without just cause, assume supervision or control of or otherwise interfere with a local trade union directly or indirectly in such a way that the autonomy of the local trade union is affected.

(2) A parent trade union or a council of trade unions shall not, without just cause, remove from office, change the duties of an elected or appointed official of a local trade union or impose a penalty on such an official or on a member of a local trade union.

(3) On an application relating to this section, when deciding whether there is just cause, the Board shall consider the trade union constitution but is not bound by it and shall consider such other factors as it considers appropriate.

(4) If the Board determines that an action described in subsection (1) was taken with just cause, the Board may make such orders and give such directions as it considers appropriate, including orders respecting the continuation of supervision or control of the local trade union.

9. Sections 76 and 87(2) are "standard" unfair labour practice provisions, designed to prevent an interference with the exercise of statutory rights. Section 76 is framed in quite general terms. Section 87 is more specific. But both sections protect individuals from improper pressure.

10. Section 149 has a completely different focus. It is part of the so-called "Bill 80" reforms (sections 145-150), which were introduced into the statute in 1993. Those sections apply only in the construction industry and are concerned with internal union affairs, and local union independence.

11. Section 149 of the Act prevents a "parent union" (usually with headquarters in the United States) from suspending the autonomy of a "local union" in Ontario, unless there is "just cause" to do so. The statute leaves it to the Board to determine what "just cause" means in any particular case. However, section 149(4) also gives the Board the power to modify or set aside the terms of supervision, *even if the American parent union had just cause to impose it, in the first place.*

12. When applying section 149, the Board is not obliged to give overriding weight to a parent union's constitution; for, in addition to section 149(3) [see above], section 145(3) of the Act reads this way:

In the event of a conflict between any provision in sections 146 to 150 and any provision in the constitution of a trade union, the provisions in sections 146 to 150 prevail.

And section 145(2) provides:

In the event of a conflict between any provision in sections 146 to 150 and any other provision of this Act, the provisions in sections 146 to 150 prevail.

So the scheme of the Act is abundantly clear: the “autonomy rights” articulated in section 149 prevail over any provision in the union constitution, and *also prevail over any other provision of the Labour Relations Act itself*. Section 145(2) underlines the importance which the Legislature has given to the Bill 80 provisions respecting local union autonomy.

* * *

13. The applicants seek an interim order restricting the authority of the receiver who has been appointed by the American parent to run the affairs of the OPC and its Ontario locals. The applicants maintain that unless the receiver is so restrained, he will try to abort the ongoing section 154 application, and he will assert bargaining positions that have already been repudiated by the Ontario membership. In the applicant’s submission, the interference with bargaining will be difficult or impossible to rectify later, and the interference with the section 154 proceeding will impede an application where time is of the essence. The applicants point out that a section 154 application can only be made, once, every three years, and the issues raised in such application probably have to be sorted out, before provincial bargaining takes place.

14. In the applicants’ submission, unless such order is given, neither the litigation nor the Ontario bargaining will be conducted in accordance with the scheme of the Act. The interests of the Ontario members will be ignored, and the American parent will profit from what the OPC says are precipitous and unlawful actions. The applicants say that if interim relief is denied, their rights under the statute will be seriously compromised - even if their legal position is ultimately sustained by the Board.

15. The OPC does not deny that the American parent has a right to participate in the section 154 proceedings, as well as a limited right to participate in the Ontario provincial bargaining. However, in counsel’s submission, the American parent cannot unilaterally abort the proceeding before the Board, nor “hijack” the provincial bargaining process. He argues that unless interim relief is granted, that is what is likely to happen.

16. The American parent union replies that it is entitled - indeed it is required - to ensure that the terms of the international constitution are followed; and it is likewise required to ensure that local unions or groups of members bound by that constitution, do not take positions that are contrary to the interests of the organization as a whole. The American parent does not quarrel with the right of the OPC to promote its local interests. But in counsel’s submission, it must do so in accordance with the union constitution, and in a manner that does not conflict with the broader interests of the international union.

* * *

17. At the heart of this controversy, therefore, is a dispute *within the union* about the appropriate role for the American parent - and, in particular, the extent to which the American parent can control Ontario locals and influence collective bargaining outcomes in Ontario. And that, in turn, raises questions about the relationship between the union’s constitutional requirements, and the legal framework imposed by the *Labour Relations Act* - especially following “Bill 80”.

18. I shall have more to say about these matters later. First, it may be useful to briefly describe the parties and the institutional context in which these various proceedings arise. I will then look at the statutory framework and the availability (or appropriateness) of “an interim order”.

II - Who the parties are

19. The American parent is an international craft union with headquarters in the United States. It has membership in both the United States and Canada. A significant number of those members reside in Ontario, and work for Ontario employers.

20. Like many international unions, the American parent is subdivided into geographically-based “local unions”, with their own constitution or bylaws. An individual becomes a “member” of the American parent by joining one of these local unions. Article IV A of the International Union constitution provides:

“Every member of a Local Union affiliated with the International Union shall by virtue of such membership become a member of the International, and no person ineligible to become or remain a member of the International Union may be a member of any affiliated Local.”

Under the international constitution, the local unions have primary responsibility for negotiating and administering collective agreements, administering the local “hiring hall” and generally addressing the needs of the local members.

21. The OPC was established in 1908, and has always been an affiliate of the American parent union. Basically, the OPC is an umbrella organization of Ontario locals, with its own constitution, bylaws, and independent authority. However, for statutory purposes, the OPC is also a “certified council of trade unions”, and thus a “trade union” in its own right (see sections 1(1) and 12 of the Act, and the 1985 decision of this Board in File No. 1913-84-R). The American parent and its Ontario locals are also “trade unions” within the meaning of the *Labour Relations Act*.

22. As “trade unions”, the institutional parties have a variety of rights and obligations under the *Labour Relations Act*. However, the internal affairs of these “trade unions” are primarily governed by their respective constitutions and bylaws. These constitutional documents determine the institutional relationships between the American parent, its Ontario locals, its Ontario members, and the OPC. Among other things, the international constitution envisages that the president of the American parent will have broad powers to suspend local autonomy, and promote the general interests of the organization.

23. In other words, when approaching the issues in this case, there are two layers of law to keep in mind: the “private law” arrangements (essentially contractual) which are set out in the unions’ constitutions; and the “public law” provisions of the *Labour Relations Act*. The constitution is (primarily) interpreted and applied by internal union bodies, and ultimately, by the Courts in the United States or Canada. The statute is interpreted and applied by the Ontario Labour Relations Board. And, as I have already noted, each party emphasizes a different aspect of this legal framework.

24. The American parent is purporting to act under its constitution, to promote what it asserts are the interests of the organization as a whole. That is why (it says) a receiver was imposed to take over some local union affairs. The American parent is concerned - perhaps justifiably - that the Ontario locals will not act in the best interests of the union.

25. The applicants focus on the interests of *members in Ontario*, and the provisions of the Ontario *Labour Relations Act*. They argue that from a statutory perspective, Ontario is unique. It is neither Manitoba nor Michigan; and that has to be taken into account when one is weighing these

competing sources of “law”. In the applicants’ submission, the actions of the American parent breach Ontario law, and an interim order is necessary to address the situation while this contention is being litigated.

III - Some institutional and collective bargaining history

26. Under the *Labour Relations Act*, a trade union can become the exclusive bargaining agent for the employees of an employer by demonstrating that the majority of those employees want the trade union to represent them. Alternatively, a trade union can acquire bargaining rights by voluntary recognition. But whether bargaining rights are established by certification or voluntary recognition (and subject to a construction industry variation that I will come to in a minute), the trade union with bargaining rights is the entity entitled to represent employees and engage in collective bargaining on their behalf.

27. In our system of collective bargaining, the trade union with bargaining rights is the *exclusive* bargaining agent for employees, and the principal legal actor in the negotiating process. It is the union with bargaining rights which ordinarily negotiates and signs the collective agreement, and has the responsibility for collective agreement administration. This proposition has been modified a little in the context of the construction industry (see below), but the fact remains that the union entity with bargaining rights is an important juridical element in the statutory scheme. Moreover, the trade union with bargaining rights is not only *entitled* to represent employees to the exclusion of other unions and individual bargaining, it is *obliged* to do so fairly - whether or not those employees are actually *members* of the union (see sections 73 and 74 of the Act).

28. In the case of the Bricklayers’ Union, bargaining rights have traditionally been acquired either by individual local unions or by the OPC. Bargaining rights have not been acquired or held by the American parent. Employees may ultimately become *members* of the American parent by virtue of their membership in a local union and/or the OPC; but, (subject to the same construction industry qualification - see below), their bargaining agent has always been the local union or the OPC.

29. To put the matter another way: to the extent that statutory bargaining rights depend upon employee support, it is the local union or the OPC - not the American parent - which has demonstrated such support. It is the local union or the OPC - not the American parent - which first established itself as the employee-members’ statutory bargaining agent, then later engaged in collective bargaining on their behalf.

30. The American parent has not played any prominent role in Ontario collective bargaining. On the contrary. The material before the Board shows that the dominant role in collective bargaining has always been played either by the individual local unions or, in the ICI sector, by the OPC. Indeed, although ICI provincial bargaining is now mandated by statute, it is worth noting that the OPC conducted ICI bargaining on a provincial basis, *before* the introduction of the statutory scheme.

31. In 1971, all of the local unions in Ontario (which together comprise the affiliated members of the OPC), authorized the OPC to bargain on their behalf; and since at least 1973, the OPC has engaged in extended area collective bargaining. Accordingly, when province-wide bargaining was introduced in 1978, the OPC was already negotiating and signing province-wide collective agreements on behalf of its constituent locals in Ontario (and their members). As a historical and institutional matter, the OPC’s status as a “provincial bargaining agent” preceded the statutory scheme.

32. The American parent has never had a significant role in such local or provincial bargaining, nor does the international union constitution seem to contemplate a dominant role for the parent union in collective bargaining. As I read it, the thrust of the international constitution is that collective

bargaining will be conducted by local unions, or by more broadly-based councils like the OPC. It is the local union or area council (a group of locals) which routinely formulates bargaining demands, engages in collective bargaining, calls strikes, conducts ratification votes, and afterwards administers any negotiated agreement. In fact, under Article VIII H of the international constitution: “the International Union shall not be a party to or administer any collective agreement to which it is not an express signatory”; and, before engaging in collective bargaining with an employer, a local union is obliged to advise that employer that the International Union is not responsible for the results of collective bargaining.

33. In summary, I think that the thrust of the international constitution is accurately captured by Mr. Richmond’s comment: “... organizing and bargaining are conducted by the local unions and the International provides a helping hand where necessary ...”. He points out, for example, that unlike some other international unions operating in Ontario, the American parent in this case, cannot point to any history of organizing or filing certification applications to acquire bargaining rights for Ontario employees. Nor has it ever had a history of negotiating or signing collective agreements with Ontario employers. *Prior to 1978*, the name of the American parent did not appear as a party on the collective agreement documents. It was the local or the OPC who performed this collective bargaining role.

34. I have emphasized the phrase “*prior to 1978*” in a previous paragraph, because there was at least a nominal change with the introduction of province-wide bargaining. That is the “construction industry qualification” to which I referred earlier.

35. In 1978 the Legislature introduced Bill 22 which required compulsory province-wide bargaining, by trade, in the industrial, commercial and institutional sectors (ICI) of the construction industry. As a result of these amendments (now sections 151-168 of the Act), collective bargaining had to be conducted on a province-wide basis by an *employer* bargaining agency on the one hand (essentially an employer association) and an “*employee* bargaining agency” on the other (essentially a grouping of local unions). Such bargaining is conducted every three years and embraces, province-wide, all unionized employers and employees in a trade group (carpenters, plumbers, electricians, bricklayers and masons, etc.).

36. The statutory language is a bit complex, but the bargaining institutions themselves can be fairly simply described. The *employer* bargaining agency can be thought of as an umbrella employer association of unionized specialty/trade contractors (e.g. carpentry contractors), who bargain as a group, province wide. The *employee* bargaining agency can be thought of as an umbrella organization of geographically-based local unions (called “affiliated bargaining agents”) much like the OPC was prior to 1978 (and still is). The provincial *employee* bargaining agency may - *but need not* - include a parent union. (See the definitions in section 151(1) of the Act.)

37. A provincial employee bargaining agency can be created in two ways: by Ministerial *designation* under section 153 of the Act, or by *certification* by the Ontario Labour Relations Board under section 154 of the Act. Designation is an exercise of Ministerial discretion. Certification depends upon whether the application is timely, whether the applicant meets the statutory definition of an “employee bargaining agency”, and whether the applicant can demonstrate the requisite degree of local and membership support (see the “double majority” prescribed in section 154(2) of the Act).

38. Designation can (in theory) take whatever form the Minister considers appropriate. There is no requirement that the organization created by the Minister will be structured in any particular way, or will be representative of any particular mix of interests. There is no reference to local or membership support. By contrast, “certification” depends upon a substantial degree of membership and institutional support from local unions (“affiliated bargaining agents”) across Ontario.

39. Once certified, the employee bargaining agency can engage in provincial collective bargaining, with a view to concluding a 3-year provincial agreement. It is useful to note, though, that certification can only be sought towards the end of an existing provincial agreement - which is to say, just prior to the commencement of a round of provincial bargaining.

40. In other words, the scheme of the Act contemplates that the identity of the provincial bargaining agency must be sorted out in the months before bargaining commences; and this poses a practical limitation on the ability of any rival employee bargaining agencies to seek certification. An organization seeking to displace an incumbent employee bargaining agency will have only one opportunity to do so every three years. And, from a practical point of view, the Board may have to sort out who the provincial bargaining agent will be, before meaningful bargaining can take place.

41. When the provincial bargaining scheme was first established in 1978, the then Minister of Labour designated the employee bargaining agencies. In the case of the Bricklayers, the designation included the OPC *and* the American parent. That is how the American parent acquired at least a nominal role in the statutorily-regulated bargaining process. And that is the arrangement which the OPC seeks to change by its application under section 154 of the Act.

42. It is not clear now, why the American parent was added to the designation in 1978, when collective bargaining was already being conducted on a provincial basis through local unions and the OPC. Presumably, the Minister of the day thought that the American parent would have some role to play, assisting or coordinating the Ontario locals. I decline to speculate. What is clear is that the OPC's section 154 application is intended to replace a *designated organization* which *includes* the American parent, with a *certified organization* that does not.

43. The OPC makes no bones about its objective. The purpose of the section 154 application is to oust the American parent from the provincial bargaining scheme, by replacing the organization designated by the Minister with a certified organization that is directly representative of the Ontario members. That is the objective of the reference to the Minister as well: the OPC urges the Minister to amend the existing designation (under section 153(5) of the Act) so as to include only local unions or institutions situated in Ontario. And since the American parent holds no direct bargaining rights, either determination could significantly reduce its influence over Ontario collective bargaining.

44. However, I think that it is important to reiterate that, despite the presence of the American parent on the designation order for the last 20 years, the material before me indicates that the American parent has not really played a significant role in ICI provincial bargaining, which has always been conducted by the OPC in accordance with its own constitution. The American parent seems to have had a consultative role. But its representatives did not sit on the bargaining or steering committees of the OPC unless such persons were elected as delegates from their own local union in Ontario. The American parent (as such) did not give notice to bargain, did not participate in any significant way in the formulation of bargaining demands, did not participate in the conduct of strike or ratification votes, and did not pay the costs associated with collective bargaining. These mechanics were undertaken by the OPC which, directly or through its constituent locals, held bargaining rights and consulted directly with the local Ontario membership. In practice, collective bargaining demands were formulated and pressed in accordance with the wishes of the Ontario membership, as reflected by the local leadership and the officers of the OPC.

45. The American parent does not really dispute that, until recently, it did not play a prominent role in Ontario collective bargaining. However, in counsel's submission, neither was there any occasion when the OPC contemplated bargaining positions that, according to the American parent, were contrary to international union policy. The American parent did not assert an active bargaining role because,

prima facie, bargaining is a local matter and, until recently, bargaining in Ontario was conducted within acceptable constitutional norms.

46. Be that as it may, the fact remains that both before and after the advent of provincial bargaining, negotiations were conducted by the OPC and the American parent had, at most, a residual role. It is only in the most recent round of bargaining that the American parent has asserted itself, and has insisted that the OPC take to the bargaining table positions which, the OPC says, were expressly rejected by the Ontario membership. In particular, the OPC refuses to table bargaining positions which might result in the transfer of \$1.35 per hour worked by Ontario members to the coffers of the American parent union. In the OPC's view (apparently supported by the membership) this sum should be directed to the Ontario members or to uses approved by those members.

IV - The dispute over Canadian autonomy

47. I do not propose to dwell at any length upon internal union politics - not least because each party asserts that the other is acting in the best interests of the membership, and these matters may have to be canvassed, eventually, in the context of the unfair labour practice complaint. For present purposes, it suffices to say that, since at least the fall of 1995, there has been an active debate about Canadian autonomy, and whether the Ontario membership should exercise more control over the affairs of their local unions.

48. In October 1995, at the international convention in Chicago, John Joyce was elected president of the American parent union. All of the Ontario locals publicly supported the "slate of officers" that was defeated by the "slate" headed by Mr. Joyce. As things turned out, the Ontario membership is not just a minority within the international union as a whole, but the Ontario locals did not succeed in having their preferred representatives on the international executive Board. And, in the wake of the convention, certain Canadian officials were removed from their positions.

49. The validity of this election is still before the Courts of the United States.

50. In late 1995, a steering committee of the OPC, composed of elected delegates from each Ontario local union, began to develop recommendations for more autonomy for the Ontario locals. The OPC steering committee condemned the actions taken against the union's Canadian Director, and demanded his immediate reinstatement. In addition, the OPC developed a number of proposals for Canadian autonomy, including: the right to elect its own Canadian officers by secret ballot; the right to elect its own Canadian trustees on all international union pension and benefit plans by secret ballot; self-determination in the selection of affiliation to any central or provincial labour body; the right to keep dues money in Canada for the purpose of servicing the Canadian membership; etc. An OPC task force recommended that a special convention be called to discuss these recommendations.

51. These actions and proposals did not sit well with the union headquarters in Washington. In November 1995 Mr. Joyce placed the OPC in "receivership".

52. Under the constitution of the American parent, a receivership can be imposed in the discretion of the international president, is not reviewable, and can only be terminated by the president. There is no requirement to have a formal hearing before the receiver takes over, and the rights of appeal are significantly circumscribed. The terms of the receivership are prescribed by the international president, and when he exercises his discretion in this way, the receiver can assume total control over the local union, and displace the officers selected by the local membership.

53. Following the imposition of the 1995 receivership, Mr. Joyce filed charges under the international constitution against the individuals who had developed the proposals for Canadian autonomy, against the executive board members of the OPC, and against all elected business managers and presidents of the local unions in Ontario (that, as noted, had not supported him in the most recent election). Among other things, those charges could result in the officers' removal from office. In response, the locals and a number of individual applicants filed a complaint under section 96 of the *Labour Relations Act* alleging, *inter alia*, a breach of section 149 of the Act (which is reproduced above). The applicants claimed, as they do in the instant case, that the motives of the American parent were tainted, and its actions were taken without just cause.

54. Despite the receivership, the delegates to a special Ontario convention endorsed the recommendations for local autonomy.

55. In the spring of 1996, the unfair labour practice ("Bill 80") complaint was settled on terms not here relevant. In September 1996, Kingston Local 10 was put under receivership. Once again, this action was challenged in an application under section 96 of the Act alleging, *inter alia*, violations of section 76, 149 and 96(7) of the Act (a breach of the earlier settlement terms). Hearings before the Board on this new Bill 80 complaint were protracted and were only concluded in February 1998. No decision has yet been issued.

56. In or about February 1997, the OPC conducted a referendum among all of the membership in Ontario, which asked the following question:

"Do you authorize the Ontario Provincial Conference and your Local Union to take all steps necessary to establish Canadian self-government and autonomy for the members of our union in Canada?"

According to the OPC, some 65% of the membership responded to the request, and of that group, 88% endorsed the OPC's position on local autonomy. There was a significant majority of Ontario workers in favour of loosening the ties with the American parent union (although not, be it noted, breaking away from the American parent).

57. In June of 1997 the OPC held its biennial convention, which is attended by elected delegates from all of the local unions in Ontario. At that convention, the delegates passed a number of resolutions respecting the relationship between the OPC and the international union. Among them was a resolution that all "international dues checkoff" (33¢ per member per hour for each hour worked in Ontario) be withheld from the American parent until all differences were resolved.

58. The "check-off issue" refers to clauses in collective agreements that require an employer to deduct or remit a certain sum to the union - ordinarily the union that is the bargaining agent, but in this case, the American parent. Deductions of this kind are contemplated by sections 47 and 52 of the *Labour Relations Act*; and were it not for this statutory authorization bolstering the terms of the collective agreement, it is not at all clear that an employer would be entitled - much less required - to make such deductions or remittances. However, dues deductions - like compulsory union membership - are a common feature of construction industry collective agreements, and typically include remittances for a variety of pension, welfare and benefit funds, as well as sums to support the services supplied by the union.

59. In June 1997, the delegates to the OPC convention also authorized the OPC to take whatever legal or political action was necessary to remove the American parent from the provincial bargaining designation. It was this authorization which prompted the OPC to file its application under section 154 of the Act, as well as ask the Minister to change the designation under section 153(5) of the Act.

60. In late January 1998, the American parent sent notices to all local unions in Ontario, indicating that those locals were required to press for a *new deduction* of 3% of gross wages for each member in Ontario. The money so deducted would be sent to the International Masonry Institute (IMI), which is an organization sponsored by the American parent that undertakes trade training. The Ontario locals do not currently support the IMI. They do make training fund contributions for use by Ontario workers, in Ontario.

61. The IMI checkoff, together with the international union checkoff, represent 4% of the members' gross wages, or about \$1.35 per hour for every hour worked. The American parent's position is that the OPC and its Ontario locals are obliged to press for a collective agreement provision requiring Ontario employers to remit this money to the IMI. The OPC is refusing to table a demand to this effect, because, it says, the Ontario membership does not support it. The OPC submits that the Ontario members have little appetite to see \$1.35 per hour transferred to the union headquarters in Washington; and there is no evidence before me to suggest that the OPC is wrong in this regard.

62. In summary, over the last few years, there have been a number of disputes over "Canadian autonomy", culminating in a debate over whether the OPC should press a bargaining demand (amounting to \$1.35 per hour) which the American parent wants but the Ontario membership, by and large, opposes.

V - The American parent's response to the OPC's communication with the Minister of Labour, and the OPC's application under section 154 of the Labour Relations Act

63. As I have already noted, in December 1997, the OPC requested the Minister of Labour to delete the American parent from the provincial designation. At the same time, the OPC brought two applications under section 154 of the Act. Both of these initiatives had the same objective: to remove the American parent from the designation, and thereby restrict its right to participate in provincial collective bargaining in Ontario. Both initiatives were undertaken in accordance with a process contemplated by the *Labour Relations Act* of Ontario. And in both cases the OPC maintained that *it* enjoyed the support of Ontario locals and members, so that *it* should be the *designated* or *certified* "employee bargaining agency".

64. I do not know whether the Minister of Labour has completed his consideration of the OPC's request. However, hearings in the "certification matters" were scheduled to take place before the Ontario Labour Relations Board (differently constituted) on February 17, 1998 and February 20, 1998.

65. On or about January 23, 1998, the president of the OPC received a letter from the Secretary-Treasurer of the American parent. The OPC describes this letter as a "threat", which was made by the American parent, because the OPC had communicated with the Ontario Minister of Labour and had filed an application to the Ontario Labour Relations Board. As a result of these communications from the American parent, the OPC filed an unfair labour practice under section 96 of the Act (Board File 4077-97-U).

66. The hearings in the section 154 applications commenced before this Board (differently constituted), as scheduled, on February 17, 1998. The American parent intervened, and took the position that the OPC was not entitled to bring the application, and was not a proper "applicant" within the meaning of section 154. Following argument on that issue, the Board reserved its decision.

67. On February 19, 1998, the Board hearing the section 154 matter issued a short endorsement which stated, in part:

For reasons to issue later, the Board is satisfied that the Applicant is an “employee bargaining agency” within the meaning of section 151(1) of the Act, and as such, is entitled to bring the instant applications pursuant to section 154 of the Act.

The hearings were to continue the following day, February 20, 1998.

68. At the commencement of the hearing on February 20, 1998, counsel for the American parent asserted that the proceeding should not continue, and provided the OPC with a copy of an order from president Joyce, imposing a new receivership over the OPC (the 1998 receivership). The receivership was imposed for the purpose of withdrawing the request to the Minister to amend the designations filed with the Minister, and withdrawing the two applications to the Ontario Labour Relations Board, under section 154 of the Act.

69. Counsel for the American parent asserted that since the *receiver* now controlled both the OPC and its constituent locals, their officers no longer had any authority to speak for the Ontario locals, or for the Ontario members. In counsel’s submission, the receiver was now the legally designated spokesman for the Ontario locals and their members, and clothed with that authority, he had the power to withdraw the two applications under section 154 of the Act. Counsel asserted that, in effect, the receiver was now the legal representative and spokesman for the applicants, and in light of his request to withdraw the applications, the proceedings under section 154 could not continue, because there was no longer any “applicant”.

70. The OPC submitted that the American parent - a party to the section 154 application - had no authority to derail an ongoing proceeding in this way. The OPC submitted that this was merely a continuation of the unfair labour practices of which the OPC had already complained, and it was a breach of section 149 of the Act as well. In the OPC’s submission, these “highhanded” actions were an “affront” to the Board, that amounted to contempt and an abuse of process.

71. The Board panel seized with the section 154 application adjourned the matter, so that the OPC could make application for interim relief.

* * *

72. It is evident, therefore, that the primary purpose of the receivership is to abort the section 154 application and prevent the officers of the OPC from communicating with the Ontario Minister of Labour. However, I am also satisfied on the basis of the material before me (including the interchanges between counsel at the hearing) that the receiver will be instructed to take steps to secure in bargaining the \$1.35 per hour remittance referred to above - something that the American parent claims is constitutionally required and in the general union interest, but something that the OPC and the Ontario members appear to oppose. I am satisfied that the purpose of the receivership is threefold: to take control of the Ontario locals; to prevent the Ontario locals and members from effecting a change to the designation using the processes prescribed in the *Labour Relations Act*; and to secure the \$1.35 per hour payment, whether the Ontario members want it or not.

73. Counsel for the American parent submits before me that it is not his client’s intention to interfere with local bargaining or to usurp the role of the OPC and its Ontario locals. The role of the receiver is limited and relatively benign. However, at the same time, counsel asserts that the American parent is entitled to insist that its reading of the constitution prevail, and that its bargaining agenda be adhered to. In counsel’s submission, sectional interests (meaning Ontario locals) should not prevail in these circumstances, and the receiver is entitled to demand compliance with the international union’s constitutional and organizational objectives.

74. The OPC replies that the receiver is a political response to legitimate demands for Canadian autonomy, as well as an instrument to secure the \$1.35 per hour remittance which the American parent knows the Ontario members oppose. The OPC asserts that its bargaining proposals are derived from the Ontario membership and will reflect the wishes of those members. The OPC will not sign a collective agreement over the heads of those members, without putting that agreement to them for ratification. While ratification is not required by the *Labour Relations Act*, it is required by the OPC constitution; and, in counsel's submission, that is the protocol which has been followed in the past, and will be followed in the 1998 round of bargaining.

75. The OPC is prepared to make that undertaking to the Board, and its counsel observes, pointedly, that the American parent union is not prepared to make a similar undertaking. In OPC counsel's submission, the American parent is reserving an alleged right, based on its constitution, to "take over" provincial bargaining, and sign a collective agreement, without ratification, over the heads of the Ontario members and despite the fact that the OPC is *also* a party to the Minister's designation order. And that is so, despite the allegedly moderate language of the president's receivership order.

76. Counsel for the applicants reiterates that the OPC is seeking to displace the American parent in accordance with the process which is expressly prescribed in section 154 of the *Labour Relations Act* and is based upon the support of Ontario locals and members, while the American parent is attempting to take over local institutions and the provincial bargaining agency by means of the receivership. The OPC says that it is content to submit its position to the judgement of the Ontario members - both in a representation vote under section 154 (if the Board orders one), and a ratification vote to confirm any negotiated collective agreement. The American parent will commit to neither form of ratification; and in counsel's submission, that is something that the Board should take into account when determining the availability of interim relief. It is at the very least a "labour relations fact" that the Board can properly consider.

77. The OPC submits that if the receivership prevails in this regard, the provincial bargaining agency will no longer reflect the interests of the Ontario locals, but, for practical purposes, will be composed solely of delegates of the international union. The designation order will still read as if the Ontario locals have some say in the process. Their names will also appear on the ultimate collective agreement. But the only real voice at the bargaining table will be that of the appointee of the American parent; and, a proceeding properly launched under the Act will be aborted by one party to that proceeding exercising a purely contractual power.

78. In counsel's submission, the Legislature could never have intended these results - particularly in light of Bill 80 and the statutory provincial bargaining scheme.

79. In response, the American parent maintains that it is not its intention to dominate provincial bargaining - only to preserve constitutional proprieties, discourage factionalism, and promote the welfare of the union as a whole. Nevertheless, the American parent is not prepared to undertake that there will be a ratification vote, so that Ontario members can confirm their acceptance of the collective agreement by which they will be bound. Nor is the American parent inclined to renounce what it claims as its right to step into the shoes of the OPC for the purposes of negotiating or signing a collective agreement.

80. In the circumstances, I think that I have to conclude that the fears articulated by the OPC are not without foundation. After all, the receiver did assert the "right" to withdraw the section 154 proceeding then ongoing before the Board, and the international constitution may well give him the authority to sign a collective agreement without reference to the Ontario locals or members. And if the receiver is able to get its \$1.35 per hour clause into the provincial collective agreement, but the receivership is later set aside as unlawful, it is not at all clear how the Board would remedy the situation.

Section 96 allows the Board to fashion a remedy despite the provisions of a collective agreement; but the labour relations consequences of doing that are difficult to predict.

* * *

81. It will be seen, therefore, that the OPC's argument is based upon the scheme of the *Labour Relations Act*, and the efficacy of legal proceedings or collective bargaining conducted under the auspices of the *Labour Relations Act*. The American parent's argument focuses on the rights accorded to its officers under the international union constitution. That is why I earlier indicated that this case involves the relationship between "private law" and "public law".

VI - The basis for an Interim Order - section 98 of the Ontario Labour Relations Act, and section 16.1 of the Statutory Powers Procedure Act

82. The legal basis for an "interim order" can be found in section 98 of the *Labour Relations Act*, and section 16.1 of the *Statutory Powers Procedure Act* (which operates *despite* anything in the *Labour Relations Act*, and in addition to it). Those provisions were discussed at some length in *Ontario Public Service Employees Union v. The Crown in Right of Ontario*, [1996] OLRB Rep. Sept./Oct. 780 and *Power Workers' Union - CUPE Local 1000, et al. v. International Brotherhood of Electrical Workers*, [1996] OLRB Rep. Sept./Oct. 826. (See also the comments of the Saskatchewan Court of Appeal in *Burkhart v. Dairy Producers Co-op Ltd.* (1990), 74 D.L.R. (4th) 694.) I will not repeat that analysis here. I simply adopt it.

83. In my view, the remedial arsenal of the Board includes the power to make interim orders in proceedings that:

- (1) regulate the way in which the litigation before it unfolds; and
- (2) preserve the status quo and scheme articulated in the statute, until the parties' rights are adjudicated in accordance with law.

Accordingly, where the behaviour under review interferes with the statutory balance - arguably unlawfully - in ways that may be difficult to remedy later, I think that the Board has an obligation to consider whether some interim order is advisable to preserve the statutory rights and processes contemplated by the statute. For as the Board said many years ago in *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (upheld by the Divisional Court at 80 CLLC parag. 14017):

It is trite to say that all rights acquire substance, only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition.

84. No doubt, an "interim order" is an extraordinary remedy which should be exercised sparingly, lest its availability draw the parties into additional layers of litigation in pursuit of tactical advantage; moreover, the Board must be sensitive to both the limits of the law and the complexity of collective bargaining phenomena. Tinkering with one element of the system may be ineffective, or have quite unforeseeable results. That is especially so in the context of an "interim" order, where, by definition, the parties have not yet had an opportunity to fully present their case. But by the same token, interim relief has the same rationale for the Board as it has for the Courts: to enhance the efficacy of the litigation process, and ensure that unilateral action does not blunt its remedial thrust.

85. This is not to say that the approach of the Board should always parallel that of the Courts. I think that the Board is obliged to take a forensic approach, applying its labour relations experience to the particular mix of facts, and the particular private and public interests in play. In the *The Bay - Kingston* case, [1993] OLRB Rep. Dec. 1350, the Board put it this way (at page 1381):

141. In both *Loeb Highland* [[1993] OLRB Rep. May 197] and *Tate Andale* [[1993] OLRB Rep. Oct. 1019], the Board noted that its approach to [the interim relief provisions] would not necessarily parallel that of a Court - anymore than its approach to strike-related cease-and-desist orders parallels that of a Court in picketing/injunction situations. The Board is a different kind of institution. It is animated by regulatory and policy considerations that are different from those of a Court (see generally *Tomko v. Nova Scotia Labour Relations Board, et al*, [1977] 1 S.C.R. 112, and *Re Tandy Electronics Ltd. & United Steelworkers of America* (1979) 26 O.R. (2d) 68). In *Tate Andale*, the Board put it this way:

39. In the first place, we might observe that the Board is not a court; and there is no reason to expect that either its adjudicative or remedial approach should mirror that of a court. Civil practice may sometimes provide a useful analogy, but when the Act so clearly involves policy considerations, so systematically modifies common-law premises, and so clearly excludes judicial involvement (see section 110), it would be curious for the Board to make common-law criteria a governing principle of interpretation. This is not to say that the Board's approach to dispute resolution will never resemble that of the courts; however, the criteria applied, and the result reached, are more likely to be based upon the scheme and purpose of the Act, the Board's own experience, and the norms and needs of the industrial relations community. (See generally: *Alex Tomko v. Labour Relations Board of Nova Scotia, et al* (1975) 76 CLLC ¶14005 (per Laskin, C.J.C.).)

See also: *Morrison Meats Ltd.*, *supra*, paragraphs 14-16.

142. That said, though, the Board has in fact looked at some of the things which would influence the Court on an application for interim relief. The Board has considered such factors as: the relationship between the interim Order sought and the final Order if the party seeking it were entirely successful; the desirability or possibility of preserving the status quo; the definition of the status quo in a dynamic system; whether the harm suffered by the party seeking interim relief is purely economic, and thus more readily ascertainable and recoverable after the merits have been decided; what the balance of harm may be - that is, whether the "harm" of not granting an Order exceeds the "harm" occasioned by granting the interim relief requested; and whether the "harm", in this sense, extends to third party interests. To these the Board adds a policy component based upon its own experience of labour relations, its understanding of the statutory scheme, and whether there is a public interest element to be considered.

86. Ordinarily, the Board will have to be persuaded that there is at least an "arguable case" for the relief requested on the "main application" (here the section 154 proceedings, and the collateral unfair labour practice complaint). If it were otherwise, a litigant with a doubtful claim on the merits, might obtain an unwarranted advantage through the device of interim relief. However, if a litigant makes out a plausible case on the main application, one then has to consider what kind of interim order, *if any*, would appropriately balance the range of legal and collective bargaining interests under review - especially if time is of the essence, and there is some doubt whether at the end of the day the Board's remedial order can fully compensate for the delay. And in determining the content of any interim order, it seems to me that the starting point must be the statutory scheme. As the Divisional Court observed in *Radio Shack* (1980), 80 CLLC ¶14,016 and ¶14,017, the Board's remedial order ultimately "flows from the scope, intent, and provisions of the Act itself".

87. Now, of course, this observation was made in connection with the Board's authority to remedy unfair labour practices, now found in section 96 of the Act. It referred to "final" not "interim" remedies. But, in my view, it applies with equal force to the open-ended discretion in section 16.1 of the SPPA - which, after all, was designed to bolster a tribunal's remedial arsenal.

88. Accordingly, I think it may be useful to look again at how the statute regards "internal union affairs", and how internal union processes mesh with the collective bargaining regime regulated by the *Labour Relations Act*.

VII - Some further observations on the scheme of the Act

89. The *Labour Relations Act* is primarily concerned about institutional collective bargaining relationships - the trade union in its role as statutory bargaining agent for groupings of employees. Except in the construction industry (a significant exception - see below), the statute is not much concerned with internal union affairs. Nor does it prescribe any general code of “democratic practices”. The statute is exceedingly (and I think intentionally) sparse in these areas, leaving them to be determined, for the most part, by the trade union’s constitution.

90. It is the union constitution which deals with the rights of members within the organization, eligibility for office, elections, dues levels, property distribution, local autonomy, and so on. That constitution is a kind of “contract”, which can be enforced in law at the suit of an unhappy member; and outside the construction industry, the statute has nothing much to do with it. These are private, or contractual rights, asserted through the union’s own internal mechanisms, or through the general Courts (see, for example, the legal analysis in *Astgen et al. v. Smith, et al.*, [1971] O.R. 129 (C.A.)).

91. On the other hand, the “club” or “private contract model” of trade unionism developed at common law completely fails to capture the statutory dimension of trade unionism, or the statutory rights and responsibilities exercised by a modern trade union under the *Labour Relations Act*. In this sense, the common law has been eclipsed by the statute - just as the statute provides a legal foundation for collective bargaining which was lacking at common law.

92. A modern trade union is not just a “voluntary organization” like a club or church, held together by some notional contract between the members. These days, membership in the union is not “voluntary” at all, but is required as a condition of employment, by virtue of a collective agreement whose existence and legal attributes depend primarily upon the statute. Likewise, employees are obliged to support the trade union financially because the statute may require it (see section 47), and because a collective agreement contains a “closed shop” or compulsory “dues checkoff”. That is why, in some circumstances, members of a trade union engaging in reasonable dissent, are immunized from the employment consequences of internal union sanctions (see section 51 of the Act). Expulsion from membership need not result in discharge from employment, nor does it terminate the union’s obligation to represent the “non-member” in collective bargaining.

93. At common law, a trade union was a group of workers who associated together voluntarily for their mutual aid and comfort, and with the common purpose of improving their working lot by negotiating with their employer as a group. So even at common law, a trade union had a collective bargaining role. But it is this *collective bargaining function* which defines the trade union for statutory purposes (see the definition of “trade union” in section 1 of the Act), and which receives statutory support under the *Labour Relations Act*.

94. The statute does not deal with “union democracy” *per se*. But it does provide a mechanism whereby a trade union can become the employees’ exclusive bargaining agent by securing and maintaining majority support. Moreover, once a trade union has attained the status of bargaining agent, it is obliged to fairly represent all employees, *whether they are members of the union or not* (section 74 of the Act). And to complete the picture, the trade union selected by the employees continues to be their bargaining agent until they reject it, or its bargaining rights are terminated in accordance with the Act. The union’s constitution has nothing to do with it.

95. In this sense, then, a modern trade union is not a wholly private organization that can be satisfactorily analyzed solely in common law or contractual terms. To look only through that lens ignores the fact that today, a trade union is an organization which enjoys statutory support in order to facilitate statutory objectives. And among those objectives is this one, found in section 2 of the Act:

2. The following are the purposes of the Act:

1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.

96. It is not without significance that the statute envisages that a trade union will engage in collective bargaining as the “freely-designated representative(s) of the employees”. The union’s status as bargaining agent ultimately rests upon the support of employees.

97. The point is: the constitutional imperatives asserted by the American parent in this case, have to be weighed in the broader statutory context. To put the matter another way: in assessing the role of the American parent and its appointed receiver, one must look not only at the constitutional proprieties, but also at whether their activities are congruent with the overall statutory scheme. For any collision or inconsistency must be resolved in favour of the statute.

*

98. Under the *Labour Relations Act*, the principal juridical entity is the “trade union” with bargaining rights (acquired by certification or voluntary recognition). The union with bargaining rights is the *exclusive* bargaining agent representing employees for collective bargaining purposes. In fact, it is an unfair labour practice for an employer or *another trade union* to interfere with those rights or purport to exercise them. Thus, section 73 of the Act provides:

73. (1) No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers’ organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

99. Against that background, one might wonder how it is that a receiver appointed by *another* (albeit related) trade union can take over a local union and purport to speak on its behalf. How is it that a parent union, which holds no bargaining rights, can take over a local union which holds bargaining rights, then purport to exercise those rights on the local’s behalf? The statute provides no clear answer. Nevertheless, section 89 of the Act does seem to contemplate that a local union’s autonomy may be suspended - at least for a limited period of time:

89. (1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby the autonomy of such subordinate trade union, under the constitution or by-laws of the provincial, national or international trade union is suspended, shall, within 60 days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister may from time to time require.

(2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than 12 months from the date of such assumption, but such supervision or control may be continued for a further period of 12 months with the consent of the Board.

100. On the other hand, section 89 is completely silent on what this means for “local unions” which enjoy the statutory status of exclusive bargaining agent, and it certainly does not follow that a “receiver” may exercise his authority in a way that is contrary to the statute (for example, contrary to the statutory duty to fairly represent employees) or inconsistent with the statutory scheme. The imposition of a receiver is not immune from scrutiny, nor does it alter the locus of bargaining rights. It does not mean that the receiver becomes the employees’ statutory bargaining agent - or at least there is no case law that says so, and section 68 of the Act seems to contemplate OLRB involvement in any transfer of bargaining rights occasioned by internal union reordering.

101. There is also a respectable body of jurisprudence (relied upon by the OPC in this case) to the effect that the imposition of a receivership or other internal union sanction may, in some circumstances, be considered an unlawful interference with statutory rights (see for example: *International Association of Bridge, Structural and Ornamental Ironworkers Local 721 et al. v. The International Association of Bridge, Structural and Ornamental Ironworkers, et al.*, [1982] OLRB Rep. Oct. 1487; *John M. Lussier et al. v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46*, [1974] OLRB Rep. Aug. 569; *William Egan v. Trial Board of the International Brotherhood of Painters and Allied Trades, Local 1783*, [1983] OLRB Rep. Feb. 298; and *Louis Lauzon v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91*, [1994] OLRB Rep. June 717; and *Hank Brouwers v. Canadian Union of Shinglers and Allied Workers*, [1995] OLRB Rep. Sept. 1160). Section 89 does not suspend the operation of the other provisions of the statute, and it is obvious that, in the construction industry, section 89 must now be read in light of the terms of “Bill 80”.

102. I do not suggest that the principles articulated in these cases are necessarily applicable to the American parent in this case. That will no doubt be something that the panel hearing “the merits” of the unfair labour practice case will have to decide. I note only that the “constitutional correctness” of a union’s actions, is not always a complete answer to a traditional unfair labour practice allegation; and that in the construction industry, it may be no answer at all to a so-called “Bill 80 application” brought under sections 145-150 of the Act.

103. Bill 80 represents a significant accretion to the Board’s authority to regulate “internal union affairs”, and a significant addition to its authority to determine what impact - if any - internal union actions will have on collective bargaining institutions in Ontario. Looked at differently, Bill 80 significantly reduces the authority of a parent union to dictate to its Ontario locals - whatever the constitution may say.

104. It seems to me, therefore, that the permissive provisions of section 98 of the *Labour Relations Act* and section 16.1 of the *Statutory Powers Procedure Act* have to be read in that context. Interim relief, if any, has to be shaped in a way that will both balance the “private interests” of the litigants and, at the same time, enhance the efficacy of the statutory scheme. What the “home statute” says is important - not only in respect of the unfair labour practice regime (including Bill 80) but also with respect to the general regulatory framework.

105. So, with that in mind, it may be useful to return, once more, to the legislative arrangements governing provincial collective bargaining.

* * *

106. As I have already mentioned, the shape of the provincial bargaining system is fairly simple to describe: collective bargaining takes place on a provincial basis, by trade (carpenters, bricklayers, etc.) every three years. The employer side of the bargaining table consists of a designated employer bargaining agency, which, for practical purposes, is an employer association representing unionized

employers from across the province. The union side of the bargaining table is a council of geographically-based local trade unions - usually with municipal roots (the Toronto local, the London local, the Ottawa local, etc.) or groupings of those locals. Sometimes the EBA is itself a council of locals or has councils of locals among its subdivisions.

107. The provincial bargaining agencies negotiate a collective agreement that applies throughout the province to all unionized employers. There can be no local bargaining (see section 162 of the Act). Accordingly, the provincial collective agreement is expected to reflect both common concerns, province-wide, as well as any local variations that the provincial bargaining agencies may agree upon. These accommodations must be worked out at the *provincial* bargaining table, through the auspices of the provincial bargaining agencies, that are themselves composite groupings of employer and union interests.

108. These arrangements were originated by Ministerial designation in 1978, and for the most part, the original designations have remained intact. From time to time a Minister has modified a designation to better reflect sectional interests or address particular concerns. However, by and large, the form and composition of the provincial bargaining agencies have not changed in any material way. Each employee bargaining agency continues to encompass a diverse grouping of local and sectional interests - often, as in the present case, with some presence from the parent union as well.

109. However, designation is not the only way that an employee bargaining agency can be created. Nor need the employee bargaining agency necessarily include the parent international union (see the definition of "employee bargaining agency" in section 151 of the Act). Section 154 of the Act recognizes the possibility of *self-ordering*, so long as the proposed new bargaining agency is sufficiently representative of local unions throughout Ontario, and sufficiently representative of the Ontario members.

110. It is not quite clear how a new provincial bargaining agency would go about establishing this double majority, because until the present case, no one has ever made an application under section 154. Nevertheless, the statute clearly contemplates that Ontario locals may be able to construct *their own* provincial employee bargaining agency (by trade), and that the new provincial organization need not, necessarily, include the parent international, to which each local union may be constitutionally "subordinate" (again see the definition of "affiliated bargaining agent"). The statute contemplates that the 1978 designation is not carved in stone, but may be varied or replaced at the instance of locals and members in Ontario.

111. This question of "subordination" is worth some further reflection.

112. It is important to recognize that, by definition, an "employee bargaining agency" is an organization composed of "affiliated bargaining agents" (local unions) which, again by definition, are **subordinate** to the same parent union. In the typical case, the "affiliated bargaining agents" (for example, the Carpenters' local in Toronto, the Carpenters' local in London, etc.) are geographically-based organizations that are constitutionally linked to each other, as well as to a parent union - normally with headquarters in the United States. To continue the metaphor: an employee bargaining agency is, by definition, composed of related members of the same craft union family. And that will necessarily be so, *whoever* the employee bargaining agency may be.

113. This means, in practice, that any rival employee bargaining agency that seeks to displace an existing one under section 154, will be composed of some grouping of the same Ontario family members. Moreover, all of the locals will continue to be constitutionally subordinate to their common parent - and thus subject to potential receivership if the parent union opposes any local restructuring. In other words, the entities for which the certification process was designed, are all exposed to the kind of

constitutional control by their parent union which the American parent has sought to exercise in the instant case.

114. That is why the applicants argue that the receiver should not be permitted to interfere with an application under section 154. Because if he can, a parent union will always have a veto over any restructuring in Ontario initiated by the locals themselves. A parent union need only put those locals under trusteeship, remove the local leadership, take over direction of the locals, withdraw support for the fledgling employee bargaining agency, and direct that the locals and the fledgling employee bargaining agency withdraw the application for certification.

115. And in fact, that is precisely what the American parent purported to do in this case: it put the OPC in receivership, then purported to act on its behalf in seeking to withdraw the section 154 application. According to the American parent, the receiver now spoke for the local unions and local union members, so the receiver was entitled to withdraw their application to form a new provincial bargaining agency composed only of the Ontario locals/members. Through the use of constitutional controls, the American parent had a veto over institutional change, and a veto over the certification alternative contemplated by section 154 of the Act.

116. The applicants allege that these actions were “politically motivated” because of the Ontario locals’ opposition to the current slate of international union officers. The applicants say that the real purpose of the receivership is to extract substantial sums (\$1.35 per hour) from the pockets of Ontario members, who otherwise would not willingly agree to pay these amounts. The applicants allege that the American parent is not treating other locals in this way: the Ontario locals and the OPC have been singled out for adverse treatment.

117. Beyond that, though, the applicants contend that this purported exercise of constitutional authority is totally inconsistent with the scheme of the Act - giving an American parent a veto over local restructuring, which would render the section 154 mechanism practically meaningless. Indeed, counsel for the OPC points out that, on the responding parties’ legal theory, the receiver’s authority *could also be exercised in respect of the union representatives who speak for the locals and members in the existing designated provincial bargaining agency*. On the responding parties’ theory, the American parent, using its receivership power, could take over the locals, eject the local officers, and select their replacements on the provincial bargaining agency; so that although the designation would *nominally* encompass representatives from the American parent as well as the Ontario locals, the actual delegates would be the nominees of the American parent. And that, too, is what counsel fears will happen, because it is the only way that the American parent can secure a contract clause transferring to its account \$1.35 per hour from Ontario workers. Thus, counsel says that, quite apart from the unfair labour practice allegations (especially section 87(2) and the “Bill 80 allegations”), this particular constitutional exercise is inconsistent with the statutory scheme.

118. I do not think that it is appropriate to comment on the American parent’s “motives”, or say much about the validity of the applicants’ unfair labour practice allegations. Those questions will be explored by the panel hearing “the merits” of the case; and it may turn out that the facts, when considered in their totality, do not disclose a breach of the *Labour Relations Act*, or a situation in which the Board would be inclined to intervene. However, what I have tried to elaborate, and what I think it is important to understand, is the relationship between these internal union developments, on the one hand, and the collective bargaining institutions and processes regulated by the statute, on the other. It is that tension which is being tested in the application under section 154 of the Act, the collateral unfair labour practice litigation, and this application for interim relief.

VIII - Is some “interim order” necessary, and, if so, what form should it take?

119. I am satisfied on the basis of the material before me that the applicants have made out at least an “*arguable case*” that the responding parties’ behaviour involves a “traditional unfair labour practice” (i.e. a breach of section 76 or 87(2)), as well as a breach of the special construction industry regulations found in section 149 of the Act.

120. It is certainly arguable that the actions and sanctions initiated by the American parent were intended to, or had the effect of, interfering with the exercise of rights under the statute. Likewise, it is arguable that those actions might be construed as a form of “penalty” because the OPC and its officers have launched a proceeding under section 154 or propose to participate in that proceeding and give evidence as necessary. Moreover, I think that these propositions are “arguable”, whether or not, as the OPC claims, the American parent’s actions are tainted by inappropriate political motives.

121. I am also satisfied that it is quite arguable that the receivership was undertaken “without just cause”, and/or that the particular actions of the receiver in respect of the section 154 application or the Ontario bargaining, might be subject to successful review under section 149(4). It is, to say the least, a novel proposition to suggest that an American parent can effectively insulate itself from challenge under section 154 of the Act, by the simple expedient of putting all of the Ontario locals under trusteeship and dismissing their local officers; and while counsel for the union is correct that section 89 of the Act contemplates the possibility of a “receivership”, I am not aware of any body of law supporting what the receiver has tried to do, or reserves his right to do here - especially in light of the Bill 80 provisions referred to earlier.

122. In the context of statutorily-regulated provincial collective bargaining, it is also novel to assert, as the American parent does, that it can require Ontario local unions holding bargaining rights for Ontario workers to assert collective bargaining demands which do not reflect the wishes of the Ontario locals or their members - particularly when the locals are recognized on the designation order (via the OPC) in precisely the same way as the American parent. Moreover, it is not seriously disputed that, until recently, local affairs and local bargaining have been conducted under the umbrella of the OPC, without a prominent role for the American parent.

123. Perhaps the conclusion urged by the American parent does indeed flow from the fact that the Ontario locals and the Ontario members are part of an international union and bound by its constitution. But the proposition is not intuitively obvious.

124. It seems to me, that when the provincial regulatory framework is considered as a whole, section 154 was intended to provide a means by which local unions can restructure their provincial bargaining agency, based upon majoritarian principles. That provincial bargaining agency may, but need not, include the parent union; and I agree with the applicants’ submission that the thrust of the section would be substantially undermined if an American parent union could frustrate a section 154 application by means of a receivership.

125. It seems to me that if the Legislature had intended to create a veto for an American parent, it would have done so explicitly - particularly where, as here, the American parent has never acquired bargaining rights for the workers of Ontario employers, has never played a dominant role in bargaining, and is present on the designation solely as a result of the exercise of Ministerial discretion in 1978.

126. Since there have been no previous applications under section 154, it is not quite clear how an application like that should unfold. (I note, for example, that the American parent does not want the application to proceed at all, and resists the possibility of a membership vote, while the OPC welcomes the prospect of a vote but does not think that it is necessary.) What is clear, is that the scheme of the

Act suggests that these matters should be dealt with in a timely fashion, prior to the onset of the next round of bargaining, so that that bargaining can be conducted by a bargaining agency representative of the interests of Ontario locals. That is why the statute prescribes that a section 154 application should be made during a 2-month window prior to the termination of the provincial agreement. And that is what the OPC has done.

127. In my view, the appropriate balance of interests in this case - the balance to be preserved by an appropriate interim order - is one in which the section 154 application can proceed in a timely fashion, without interference by the receiver appointed by the American parent union. I agree with counsel for the OPC that it would require very clear statutory language before one party to a legal proceeding was given the right to deprive another party of the right to proceed. No such language is present in this case, nor does it flow from the "private law" considerations spelled out in the constitution of the American parent.

128. It seems to me that *the statute itself provides the mechanism* by which the parties can sort out their differences on the identity and composition of the provincial bargaining agency. The statute itself provides the formula by which this question should be resolved, in accordance with the majoritarian wishes of the Ontario locals.

129. As a party to the section 154 proceedings, the American parent would be able to make whatever argument it considers appropriate. However, I do not think that it is entitled to use the terms of its constitution to derail the proceeding, or usurp the role and voice of the Ontario locals - a role and voice which is historically entrenched and recognized in the statute itself. For not only is this constitutional assertion apparently inconsistent with the scheme of the Act, and "quite arguably unlawful" under Ontario law, but it must also be remembered that the very purpose of the statute is "to facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees". And in this setting, the "freely-designated representatives of the employees" are the local unions: holding bargaining rights, situated in Ontario, and grouped together under the umbrella of the OPC.

130. With these considerations in mind, and pursuant to section 98 of the *Labour Relations Act* and section 16.1 of the *Statutory Powers Procedure Act*, the Board directs that the American parent union and its officers or agents (including the receiver) cease and desist from interfering, directly or indirectly, with the section 154 proceedings currently pending before the Board. In particular, the American parent, its officers and agents (including the receiver), shall not interfere with the applicants' right to retain or instruct counsel, and to extend funds for that purpose that are derived from monies paid to the OPC or to the Ontario locals, by Ontario members of the union.

131. I agree with counsel for the American parent that section 149 - unlike section 147 - does not operate automatically to stay the activities of a receiver, whose status is being challenged. However, neither does section 149 provide that the activities of the receiver are immune from scrutiny by means of an interim order, or that the receiver can ignore the legislative scheme, or obligations under the *Labour Relations Act*. In my view, it is more important that the proceedings before the Board under section 154 and section 96 (the unfair labour practice case) proceed without interference, than that the American union's internal power structure be maintained.

132. The Board therefore further directs that the American parent, its officers and agents, shall not interfere with the unfair labour practice proceedings currently before the Board. In particular, the American parent union, its officers and agents (including the receiver), shall not interfere with the applicants' right to retain or instruct counsel with respect to the unfair labour practice proceedings, or to extend funds for that purpose derived from monies paid to the OPC or the Ontario locals, by Ontario members of the union.

133. The purpose of these interim orders is to ensure that the statutory rights of the parties will be adjudicated in accordance with the scheme of the Act, without interference by the American parent under the terms of its constitution.

134. The Board will remain seized to make such further or other Orders as seem necessary to effect this purpose.

135. Unless a panel of the Board otherwise directs, these interim orders shall remain in effect until these proceedings are completed.

IX - Should some order be made with respect to the upcoming provincial bargaining?

136. Any interim order respecting the upcoming provincial collective bargaining is much more problematic, because the mix of interests is more complicated (employer interests are involved), and because the process is inherently more dynamic and thus unpredictable. Moreover, as a practical matter, collective bargaining is likely to be postponed until the section 154 proceeding is completed and the identity of the employee bargaining agency is confirmed. So any interim order at this stage may be premature.

137. That said, the involvement of the receiver in bargaining raises the same kinds of concerns as it does in respect of the section 154 proceeding: the receiver is asserting authority which may ultimately be declared unlawful, yet by seizing the initiative in this way, the American parent may achieve an advantage that is difficult to rectify later.

138. There may be a sustainable basis for putting the OPC into receivership, and for asserting bargaining positions that may not reflect the wishes of the Ontario members. An assessment of \$1.35 per hour may well be in the overall interests of the union as a whole. And it may be that although the American parent is only one part of the provincial bargaining agency, it can use its constitutional power to drive the collective bargaining agenda in Ontario.

139. However, it is not at all obvious that this is so, and I am troubled by the fact that the American parent seems to be asserting a bargaining position that is not supported by Ontario members. For however delicately it wishes to put it, the American parent is claiming the right to displace the local officers and to sign a collective agreement without ratification by the workers bound by it. Of course, in the construction industry, a collective agreement can be signed without employee ratification, so the scenario is not, for that reason, inconsistent with the scheme of the Act. But it is inconsistent with the practice for the last 20 years; and if such bargaining position does find its way into the collective agreement, the result might be difficult to unwind later without completely reopening the provincial bargaining.

140. It seems to me, therefore, that the only way to preserve the “status quo”, pending the litigation of the parties’ rights under the *Labour Relations Act*, is to direct that collective bargaining proceed, through the auspices of the current designated employee bargaining agency, unless it is changed pursuant to sections 153 or 154 of the Act. *Such bargaining must proceed, as it has in the past, in accordance with the OPC constitution, without interference by the receiver or the American parent.*

141. As a party to the existing designation, the American parent will have an opportunity to participate in the bargaining as it has done in the past. But unless the propriety of the receivership is sustained and the Board makes no Order under section 149(4), the American parent will not have the right to supplant the Ontario locals, to insist on bargaining positions which are opposed by the Ontario organizations, or to sign a collective agreement, without ratification, over the heads of the Ontario membership.

142. Not to put too fine a point on it: in my view, it is more important that the rights of Ontario workers be sorted out in accordance with the scheme of the Act, than that the American parent assert its constitutional authority or collect its \$1.35 per hour - however worthy the cause to which those funds may be devoted. Labour relations policy considerations strongly favour the position asserted by the applicants.

143. In accordance with the observations above, the Board will remain seized in case there is any difficulty implementing these interim orders, or in case any further order may be required; moreover, as is perhaps obvious, the panels hearing the "main applications" can vacate these interim orders and make such other orders as may be called for in the situation which then exists.

3519-97-R; 3520-97-R Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Applicant v. Terrazzo, Tile and Marble Guild of Ontario Inc. and International Union of Bricklayers and Allied Craftsmen, Responding Parties v. Locals 6, 7 and 25, Intervenor; Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, Applicant v. Masonry Industry Employers' Council of Ontario and International Union of Bricklayers and Allied Craftsmen, Responding Parties v. Locals 6, 7 and 25, Intervenor

Bargaining Rights - Certification - Construction Industry - Ontario Provincial Council ("OPC") applying under section 154 of the Act to be certified to represent 2 provincial bargaining units of affiliated bargaining agents where those units currently represented by designated Employer Bargaining Agency composed of OPC together with International union - Board finding that OPC meeting definition of "employee bargaining agency" in section 151 of the Act and, therefore, entitled to bring application under section 154 of the Act - Board satisfied that OPC may claim to represent affiliated bargaining agents by virtue of designation as part of Employee Bargaining Agency, and that a majority of affiliated bargaining agents (11 of 14) support the OPC application - Board prepared to infer that the 11 affiliated bargaining agents also hold bargaining rights for the majority of employees who would be covered by a provincial agreement and that double majority requirement in section 154 of the Act satisfied by OPC - Board affording parties ten days to assert that that inference incorrect, failing which the OPC will be certified

BEFORE: *Robert Herman*, Alternate Chair.

APPEARANCES: *L.A. Richmond, J. Coelho, T. Oldham, K. Wilson, A. Leduc, J. Haggis, D. Buttazzoni and L. Scodellaro* for the applicant; *Donald K. Eady and Andrew C. Lewis* for the International Union of Bricklayers and Allied Craftsmen, and its Locals 7 and 25; *Damian Rigolo* for Masonry Industry Employers' Council of Ontario; *Bob Sanelli* for Terrazzo, Tile and Marble Guild of Ontario Inc.

DECISION OF THE BOARD; April 28, 1998

1. These are similar applications filed pursuant to the provisions of section 154 of the *Labour Relations Act, 1995*. This section was introduced into the Act as part of the 1978 amendments, which imposed a province-wide bargaining scheme for the industrial, commercial and institutional ("ICI") sector of the construction industry. Section 154 reads as follows:

154. (1) During the period between the 120th and the 180th days prior to the termination of a provincial agreement, an employee bargaining agency, whether designated or not, may apply to the Board to be certified to represent in bargaining a provincial unit of affiliated bargaining agents.

(2) Where the Board is satisfied that a majority of the affiliated bargaining agents falling within the provincial unit is represented by the employee bargaining agency and that the majority of affiliated bargaining agents holds bargaining rights for a majority of employees that would be bound by a provincial agreement, the Board shall certify the employee bargaining agency.

2. The Employee Bargaining Agency (the use of capitals is meant to indicate the designated or certified Employee Bargaining Agency, as contrasted with an entity which is an “employee bargaining agency”, but not so designated or certified, and therefore is described without capital letters) designated by the Minister on March 29, 1978 for both trades was a combination of the responding party, the International Union of Bricklayers and Allied Craftsmen (the “International”), and the applicant, the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (the “OPC”). In each application, the OPC applies under section 154 to be “certified” by the Board to alone become the Employee Bargaining Agency, and as such, to be authorized (as statutorily required) as the exclusive bargaining agent for bargaining in the ICI sector in the province for the unionized employees or members of the particular trade. The OPC seeks to oust the International from being part of the designated Employee Bargaining Agencies.

3. It is agreed that these applications are timely. This matter was originally heard on February 17, 1998, at which time a preliminary issue was raised by the International: whether the OPC qualified as an “employee bargaining agency”, within the meaning of section 154(1) of the Act. The International asserted that the applicant was not an “employee bargaining agency”, and did not therefore have standing to bring these applications. The Board reserved on that issue at the conclusion of that day.

4. The hearing was scheduled to resume on February 20, 1998, and to enable the hearing to proceed, the Board issued a short “bottom line” decision on February 18, 1998, as follows:

For reasons to issue later, the Board is satisfied that the applicant is an “employee bargaining agency” within the meaning of section 151(1) of the Act, and as such, is entitled to bring the instant applications pursuant to section 154 of the Act.

The hearing will continue as scheduled on Friday, February 20, 1998.

5. At the commencement of the hearing on February 20, 1998, the International advised the Board that it had imposed a receivership on the OPC, and had so advised the OPC approximately 15 minutes earlier. The International had done so, it asserted, in order to become legally authorized to act on behalf of the OPC in these proceedings, and thereby be able to withdraw these applications, ensuring that the International’s interests would continue to be represented in bargaining. The International submitted that the effect of the receivership was that it now spoke for the OPC, and the OPC on its own no longer had standing in these applications. The International then sought to withdraw the applications.

6. After hearing submissions from the parties as to the effects and consequences of these acts by the International, and as to the orders the Board ought to issue in the circumstances, the Board adjourned the proceedings, without ruling upon the request of the International that the applications be withdrawn, in order to permit the applicant an opportunity to file applications with the Board challenging the receivership and the purported withdrawal of the applications.

7. At the same time, the Board ordered and directed that the International take no action that would seek to or have the effect of withdrawing or ending these two applications, until the Board ordered otherwise or the parties otherwise agreed. The Board also scheduled further dates, on the

agreement of the parties, to deal with the applications that the applicant had indicated it would be filing, and other later dates for the continuation of the instant applications.

8. The OPC subsequently filed with the Board several applications which challenged the actions of the International with respect to the receivership. Ultimately, in a decision dated April 2, 1998 (as yet unreported, Board File Nos. 4532-97-M and 4533-97-U the “MacDowell” decision), the Board (differently constituted) made various orders and directions as follows:

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130. With these considerations in mind, and pursuant to section 98 of the *Labour Relations Act* and section 16.1 of the *Statutory Powers Procedure Act*, the Board directs that the American parent union and its officers or agents (including the receiver) cease and desist from interfering, directly or indirectly, with the section 154 proceedings currently pending before the Board. In particular, the American parent, its officers and agents (including the receiver), shall not interfere with the applicants’ right to retain or instruct counsel, and to extend funds for that purpose that are derived from monies paid to the OPC or to the Ontario locals, by Ontario members of the union.

132. The Board therefore further directs that the American parent, its officers and agents, shall not interfere with the unfair labour practice proceedings currently before the Board. In particular, the American parent union, its officers and agents (including the receiver), shall not interfere with the applicants’ right to retain or instruct counsel with respect to the unfair labour practice proceedings, or to extend funds for that purpose derived from monies paid to the OPC or the Ontario locals, by Ontario members of the union.

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140. It seems to me, therefore, that the only way to preserve the “status quo”, pending the litigation of the parties’ rights under the *Labour Relations Act*, is to direct that collective bargaining proceed, through the auspices of the current designated employee bargaining agency, unless it is changed pursuant to sections 153 or 154 of the Act. *Such bargaining must proceed, as it has in the past, in accordance with the OPC constitution, without interference by the receiver or the American parent.*

141. As a party to the existing designation, the American parent will have an opportunity to participate in the bargaining as it has done in the past. But unless the propriety of the receivership is sustained and the Board makes no Order under section 149(4), the American parent will not have the right to supplant the Ontario locals, to insist on bargaining positions which are opposed by the Ontario organizations, or to sign a collective agreement, without ratification, over the heads of the Ontario membership.

143. In accordance with the observations above, the Board will remain seized in case there is any difficulty implementing these interim orders, or in case any further order may be required; moreover, as is perhaps obvious, the panels hearing the “main applications” can vacate these interim orders and make such other orders as may be called for in the situation which then exists.

9. The instant applications then came back on for hearing, as previously scheduled.

10. Before turning to the issues that arose at the continued hearing, following are the reasons for the “bottom line” decision of February 18, 1998, deciding that the OPC was an “employee bargaining agency”, and as such was entitled to bring the instant applications.

11. The parties had agreed, for purposes of this issue, that no *viva voce* evidence was needed, and the Board could rely upon the materials filed.

12. Both designations name the International and the OPC as the Employee Bargaining Agency. They also both name each of them as affiliated bargaining agents, along with Locals 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 20, 23, 25, 28, 29, 30, 31, 33 and 36.

13. The International argued that the applicant had no standing to bring these applications, as it was not itself a designated Employee Bargaining Agency. In its submission, section 154 is only available in two circumstances. First, it can be used by a designated Employee Bargaining Agency, but not by any component or subset of the Employee Bargaining Agency, even if the applicant is a union that qualifies as an “employee bargaining agency”, within the meaning of section 151(1). Second, application under section 154 could be made by a union with respect to a new trade, for which there is not and has never been a designation.

14. The International relies upon the wording of section 151(1), which defines “employee bargaining agency” without reference to whether it is designated or not. As well, it notes that section 154(1) refers to the employee bargaining agency, “whether designated or not”. The combination of these two sections, it submits, yields the conclusion that section 151(1) establishes the types of organizations or unions that can be designated by the Minister, but once a designation is made, it “occupies the field” for that trade. The phrase “whether designated or not”, in section 154(1), refers to the designated Employee Bargaining Agency (where the Minister has designated), and only the designated Employee Bargaining Agency, or to an employee bargaining agency that is no part of any designation. It does not encompass part of a designated Employee Bargaining Agency.

15. Further, asserts the International, the fact that there is no provision in the Act which indicates that the effect of becoming certified under section 154 is to become authorized to act as the designated Employee Bargaining Agency formerly did, supports the argument that it is only the currently designated Employee Bargaining Agency, or a union no part of any designation, which can utilize the provisions of section 154. In both these cases, the effect of being certified under section 154 does not create a conflict with an existing Employee Bargaining Agency. In the International’s submission, if the Legislature had intended that a subset of a current Employee Bargaining Agency could apply to be certified, it would have stated in the legislation that the effect of being so certified was to supplant or displace the rights of the designated Employee Bargaining Agency. Its failure to describe which Employee Bargaining Agency would be the bargaining agent, the one designated or the one certified, suggests it did not intend that section 154 be utilized in a manner that would create the potential of having two authorized employee bargaining agencies, a state inconsistent with the provincial scheme.

16. It is helpful to set out other relevant sections of the Act. Sections 151(1), 153, 156, 157, 162 and 163 read as follows:

151. (1) In this section and in sections 144 and 152 to 168,

“affiliated bargaining agent” means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency; (“agent négociateur affilié”)

“bargaining”, except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in the definition of “sector” in section 126; (“négociation”)

“employee bargaining agency” means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union; (“organisme négociateur syndical”)

“employer bargaining agency” means an employers’ organization or group of employers’ organizations formed for purposes that include the representation of employers in bargaining; (“organisme négociateur patronal”)

“provincial agreement” means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of “sector” in section 126.

153. (1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;
- (b) despite an accreditation of an employers’ organization as the bargaining agent of employers, designate employer bargaining agencies to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

(2) Where affiliated bargaining agents that are subordinate or directly related to the different provincial, national or international trade unions bargain as a council of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection (1), and subsection 162(2) shall not apply to such exclusion.

(3) Where a designation is not made by the Minister of an employee bargaining agency or an employer bargaining agency under subsection (1) within 60 days after October 27, 1977, the Minister may convene a conference of trade unions, councils of trade unions, employers and employers’ organizations, as the case may be, for the purpose of obtaining recommendations with respect to the making of a designation.

(4) The Minister may refer to the Board any question that arises concerning a designation, or any terms or conditions therein, and the Board shall report to the Minister its decision on the question.

(5) Subject to sections 154 and 155, the Minister may alter, revoke or amend any designation from time to time and may make another designation.

(6) The *Regulations Act* does not apply to a designation made under subsection (1).

156. Where an employee bargaining agency has been designated under section 153 or certified under section 154 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement. ***

157. Where an employer bargaining agency has been designated under section 153 or accredited under section 155 to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement; and
- (b) an accreditation heretofore made under section 136 of an employers’ organization as bargaining agent of the employers in the industrial, commercial and institutional sector of the construction industry, referred to in the definition of

“sector” in section 126, represented or to be represented by the employer bargaining agency is null and void from the time of such designation under section 153 or accreditation under section 155.

162.(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) Subject to sections 153 and 161, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on April 30 calculated triennially from April 30, 1992.

163.(1) Section 57 does not apply to a designated or accredited employer bargaining agency or a designated or certified employee bargaining agency.

(2) A provincial agreement is, subject to and for the purposes of this Act, binding upon the employer bargaining agency, the employers represented by the employer bargaining agency, the employee bargaining agency, the affiliated bargaining agents represented by the employee bargaining agency, the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in the definition of “sector” in section 126, and upon such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement.

(3) Any employee bargaining agency, affiliated bargaining agent, employer bargaining agency and employer bound by a provincial agreement shall be considered to be a party for the purposes of section 133.

17. The OPC was organized as a provincial conference, pursuant to the provisions of the constitution of the International, on October 7, 1908. It has its own constitution, also approved pursuant to the constitution of the International. The powers and responsibilities of the OPC, described in its constitution and by-laws, include the power to organize and the authority to promote or establish wages, hours and other working conditions. These powers are derived from the provisions of the International Constitution itself, which authorizes the OPC to “bargain collectively on behalf of the members of some or all of its constituent locals, if these locals have authorized the [OPC] to do so ...”. All the Ontario locals are members of the OPC, and have authorized the OPC to undertake negotiations on their behalf.

18. Under the OPC constitution, provincial bargaining is to be done by the OPC, through the vehicles of a Bargaining Committee and a Steering Committee, and since 1973, the OPC has in fact been bargaining on a province-wide basis for all the Ontario Locals. As well, almost all bargaining rights have been acquired and held in the name of the individual local, or the OPC, and not the International. Through an accreditation of the OPC, issued by the Board in May, 1975, the OPC by law became entitled to exercise bargaining rights for locals across the province.

19. In 1978, the new ICI provisions became part of the Act, and the Minister named the International as a component or part of the designation of the Employee Bargaining Agency for these trades. Only then did the International acquire any right to bargain on behalf of members or to execute

the provincial agreements. For practical purposes, it remained the OPC that bargained for the affiliated bargaining agents (as the locals were now referred to in the ICI sector), and the members they represented. The role of the International was primarily to endorse any provincial agreement that was negotiated.

20. In 1985, the OPC was found to be a “council of trade unions”, within the meaning section 12 of the Act.

21. On these facts, does the OPC meet the definition of “employee bargaining agency” set out in section 151(1)? The short answer is yes. The OPC is itself an “affiliated bargaining agent”, within the meaning of this phrase in section 151(1). The OPC is also an “employee bargaining agency”, as it is also an organization of affiliated bargaining agents which are subordinate or directly related to the same international trade union, here the responding International, which was formed for purposes that include the representation of the affiliated bargaining agents in bargaining. Not only was the OPC formed in part for this purpose, it has also in fact represented all the affiliated bargaining agents in provincial bargaining, and for some considerable time. Since approximately 1973, the OPC has both bargained for all locals and been the representative provincial body responsible for administering the province-wide collective agreement, or the “provincial agreement”, as it has been referred to since 1978. The OPC therefore both meets the statutory definition of “employee bargaining agency” in section 151(1) and has in fact acted as such.

22. As an “employee bargaining agency” within the meaning of section 151(1), can the OPC apply under section 154(1)? The words used in that section state that an “... employee bargaining agency, whether designated or not, may apply to the Board to be certified ...”. These words are clear and unambiguous. If an organization meets the definition of “employee bargaining agency”, within the meaning of section 151(1), as the OPC does, then whether or not it has been designated as the Employee Bargaining Agency by the Minister, it is entitled to be an applicant under section 154(1) of the Act.

23. Both the statutory scheme and labour relations policy support this interpretation. The MacDowell decision discussed the statutory scheme and policy at some length. In that decision, the Board wrote:

35. In 1978 the Legislature introduced Bill 22 which required compulsory province-wide bargaining, by trade, in the industrial, commercial and institutional sectors (ICI) of the construction industry. As a result of these amendments (now sections 151-168 of the Act), collective bargaining had to be conducted on a province-wide basis by an *employer* bargaining agency on the one hand (essentially an employer association) and an “*employee* bargaining agency” on the other (essentially a grouping of local unions). Such bargaining is conducted every three years and embraces, province-wide, all unionized employers and employees in a trade group (carpenters, plumbers, electricians, bricklayers and masons, etc.).

36. The statutory language is a bit complex, but the bargaining institutions themselves can be fairly simply described. The *employer* bargaining agency can be thought of as an umbrella employer association of unionized specialty/trade contractors (e.g. carpentry contractors), who bargain as a group, province wide. The *employee* bargaining agency can be thought of as an umbrella organization of geographically-based local unions (called “affiliated bargaining agents”) much like the OPC was prior to 1978 (and still is). The provincial *employee* bargaining agency may - *but need not* - include a parent union. (See the definitions in section 151(1) of the Act.)

37. A provincial employee bargaining agency can be created in two ways: by Ministerial *designation* under section 153 of the Act, or by *certification* by the Ontario Labour Relations Board under section 154 of the Act. Designation is an exercise of Ministerial discretion. Certification depends upon whether the application is timely, whether the applicant meets the statutory definition of an “employee bargaining agency”, and whether the applicant can demonstrate the requisite degree of local and membership support (see the “double majority” prescribed in section 154(2) of the Act).

38. Designation can (in theory) take whatever form the Minister considers appropriate. There is no requirement that the organization created by the Minister will be structured in any particular way, or will be representative of any particular mix of interests. There is no reference to local or membership support. By contrast, "certification" depends upon a substantial degree of membership and institutional support from local unions ("affiliated bargaining agents") across Ontario.

39. Once certified, the employee bargaining agency can engage in provincial collective bargaining, with a view to concluding a 3-year provincial agreement. It is useful to note, though, that certification can only be sought towards the end of an existing provincial agreement - which is to say, just prior to the commencement of a round of provincial bargaining.

40. In other words, the scheme of the Act contemplates that the identity of the provincial bargaining agency must be sorted out in the months before bargaining commences; and this poses a practical limitation on the ability of any rival employee bargaining agencies to seek certification. An organization seeking to displace an incumbent employee bargaining agency will have only one opportunity to do so every three years. And, from a practical point of view, the Board may have to sort out who the provincial bargaining agent will be, before meaningful bargaining can take place.

41. When the provincial bargaining scheme was first established in 1978, the then Minister of Labour designated the employee bargaining agencies. In the case of the Bricklayers, the designation included the OPC *and* the American parent. That is how the American parent acquired at least a nominal role in the statutorily-regulated bargaining process. And that is the arrangement which the OPC seeks to change by its application under section 154 of the Act.

42. It is not clear now, why the American parent was added to the designation in 1978, when collective bargaining was already being conducted on a provincial basis through local unions and the OPC. Presumably, the Minister of the day thought that the American parent would have some role to play, assisting or coordinating the Ontario locals. I decline to speculate. What is clear is that the OPC's section 154 application is intended to replace a *designated organization* which *includes* the American parent, with a *certified organization* that does not.

43. The OPC makes no bones about its objective. The purpose of the section 154 application is to oust the American parent from the provincial bargaining scheme, by replacing the organization designated by the Minister with a certified organization that is directly representative of the Ontario members. That is the objective of the reference to the Minister as well: the OPC urges the Minister to amend the existing designation (under section 153(5) of the Act) so as to include only local unions or institutions situated in Ontario. And since the American parent holds no direct bargaining rights, either determination could significantly reduce its influence over Ontario collective bargaining.

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106. As I have already mentioned, the shape of the provincial bargaining system is fairly simple to describe: collective bargaining takes place on a provincial basis, by trade (carpenters, bricklayers, etc.) every three years. The employer side of the bargaining table consists of a designated employer bargaining agency, which, for practical purposes, is an employer association representing unionized employers from across the province. The union side of the bargaining table is a council of geographically-based local trade unions - usually with municipal roots (the Toronto local, the London local, the Ottawa local, etc.) or groupings of those locals. Sometimes the EBA is itself a council of locals or has councils of locals among its subdivisions.

107. The provincial bargaining agencies negotiate a collective agreement that applies throughout the province to all unionized employers. There can be no local bargaining (see section 162 of the Act). Accordingly, the provincial collective agreement is expected to reflect both common concerns, province-wide, as well as any local variations that the provincial bargaining agencies may agree upon. These accommodations must be worked out at the *provincial* bargaining table, through the auspices of the provincial bargaining agencies, that are themselves composite groupings of employer and union interests.

108. These arrangements were originated by Ministerial designation in 1978, and for the most part, the original designations have remained intact. From time to time a Minister has modified a

designation to better reflect sectional interests or address particular concerns. However, by and large, the form and composition of the provincial bargaining agencies have not changed in any material way. Each employee bargaining agency continues to encompass a diverse grouping of local and sectional interests - often, as in the present case, with some presence from the parent union as well.

109. However, designation is not the only way that an employee bargaining agency can be created. Nor need the employee bargaining agency necessarily include the parent international union (see the definition of "employee bargaining agency" in section 151 of the Act). Section 154 of the Act recognizes the possibility of *self-ordering*, so long as the proposed new bargaining agency is sufficiently representative of local unions throughout Ontario, and sufficiently representative of the Ontario members.

110. It is not quite clear how a new provincial bargaining agency would go about establishing this double majority, because until the present case, no one has ever made an application under section 154. Nevertheless, the statute clearly contemplates that Ontario locals may be able to construct *their own* provincial employee bargaining agency (by trade), and that the new provincial organization need not, necessarily, include the parent international, to which each local union may be constitutionally "**subordinate**" (again see the definition of "affiliated bargaining agent"). The statute contemplates that the 1978 designation is not carved in stone, but may be varied or replaced at the instance of locals and members in Ontario.

111. This question of "subordination" is worth some further reflection.

112. It is important to recognize that, by definition, an "employee bargaining agency" is an organization composed of "affiliated bargaining agents" (local unions) which, again by definition, are **subordinate** to the same parent union. In the typical case, the "affiliated bargaining agents" (for example, the Carpenters' local in Toronto, the Carpenters' local in London, etc.) are geographically-based organizations that are constitutionally linked to each other, as well as to a parent union - normally with headquarters in the United States. To continue the metaphor: an employee bargaining agency is, by definition, composed of related members of the same craft union family. And that will necessarily be so, *whoever* the employee bargaining agency may be.

113. This means, in practice, that any rival employee bargaining agency that seeks to displace an existing one under section 154, will be composed of some grouping of the same Ontario family members. Moreover, all of the locals will continue to be constitutionally subordinate to their common parent - and thus subject to potential receivership if the parent union opposes any local restructuring. In other words, the entities for which the certification process was designed, are all exposed to the kind of constitutional control by their parent union which the American parent has sought to exercise in the instant case.

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117. Beyond that, though, the applicants contend that this purported exercise of constitutional authority is totally inconsistent with the scheme of the Act - giving an American parent a veto over local restructuring, which would render the section 154 mechanism practically meaningless. Indeed, counsel for the OPC points out that, on the responding parties' legal theory, the receiver's authority *could also be exercised in respect of the union representatives who speak for the locals and members in the existing designated provincial bargaining agency*. On the responding parties' theory, the American parent, using its receivership power, could take over the locals, eject the local officers, and select their replacements on the provincial bargaining agency; so that although the designation would *nominally* encompass representatives from the American parent as well as the Ontario locals, the actual delegates would be the nominees of the American parent. And that, too, is what counsel fears will happen, because it is the only way that the American parent can secure a contract clause transferring to its account \$1.35 per hour from Ontario workers. Thus, counsel says that, quite apart from the unfair labour practice allegations (especially section 87(2) and the "Bill 80 allegations"), this particular constitutional exercise is inconsistent with the statutory scheme.

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128. It seems to me that *the statute itself provides the mechanism* by which the parties can sort out their differences on the identity and composition of the provincial bargaining agency. The statute itself provides the formula by which this question should be resolved, in accordance with the majoritarian wishes of the Ontario locals.

24. Under the province-wide statutorily imposed scheme, the Employee Bargaining Agency has exclusive authority to bargain on behalf of the affiliated bargaining agents it represents (section 156), and there can only be one provincial agreement in effect (section 162(1)). It must follow that there can only be one Employee Bargaining Agency, at any point in time, holding and exercising the exclusive authority enjoyed by an Employee Bargaining Agency. To have two employee bargaining agencies, each with some overlapping, co-existent, or partial authority to bargain, would be inconsistent with other provisions of the Act, and would effectively undermine the statutory province-wide structures and mechanisms of bargaining in the ICI sector.

25. The structure of bargaining in the ICI sector requires a single representative organization for each trade, solely responsible for all bargaining in the province. One organization represents the unions, and one represents the employers. These are the Employee Bargaining Agencies and the Employer Bargaining Agencies, and they are similarly established, either through Ministerial designations or certification by the Board. These are mirror organizations, the “yin and yang” of provincial bargaining, if you will, and they bargain with each other, to achieve one provincial agreement. Where an Employee Bargaining Agency has been certified, it becomes the only Employee Bargaining Agency with bargaining authority in the ICI. To have two Employee Bargaining Agencies at any one time (that is, two employee bargaining agencies with any legal authority to be the exclusive bargaining agent for the statutory purposes and with the statutory powers set out in the Act) would completely upset the core aspects of the province-wide scheme: one Employee Bargaining Agency, one Employer Bargaining Agency, one provincial agreement.

26. Section 156 makes this reality clear. It refers to the vesting of rights in the Employee Bargaining Agency, whether designated under section 153 or certified under section 154. Whatever method of becoming the Employee Bargaining Agency has been chosen or utilized, only one Employee Bargaining Agency will have the authority to bargain.

27. The words used in section 154 also reflect the same two procedures for becoming authorized as the Employee Bargaining Agency, where they say “whether designated or not”. Surely these words indicate two methods by which an employee bargaining agency can acquire the status of Employee Bargaining Agency, authorized under the statute to bargain in this sector. The timeliness limitation in section 154(1) is further support for this view. The open period is defined as between the “120th and 180th days prior to the termination of a provincial agreement”, limiting applications to change the Employee Bargaining Agency to the period at least four months before the end of the agreement. The intent is to have the new, exclusive, Employee Bargaining Agency in place when bargaining begins. If the certified Employee Bargaining Agency did not replace the designated Employee Bargaining Agency in bargaining, why link this time limitation to the end of the term of the agreement?

28. The wording of section 153 is to the same point. Section 153 is the section granting the Minister the power to designate the Employee Bargaining Agency, and the Employer Bargaining Agency. Subsection 153(5) limits the power of the Minister to change designations, making the power subject to the overriding authority of the Board to certify under sections 154 or 155. The Minister would be unable to designate an Employee Bargaining Agency for a trade if an Employee Bargaining Agency had been certified by the Board under section 154, suggesting that a certified Employee Bargaining Agency has the powers previously enjoyed by the designated Employee Bargaining Agency.

29. The International argues that only a trade union engaged in a new trade, one not covered as yet by any designation, or the currently designated Employee Bargaining Agency, can utilize the provisions of section 154. Such an interpretation makes little sense. With respect to a new trade, it is unclear how a new trade in construction could be represented by a “trade union” that would qualify as a “trade union” within the meaning of section 126 of the Act, or an “employee bargaining agency” within the meaning of section 151(1). If such a union were not so qualified, it could not utilize section 154 (cf. *Ontario Hydro*, [1997] OLRB Rep. Jan./Feb. 82, at ¶31 and following). Nor is it apparent how any new trade could develop in a way or to a point where none of the current craft construction unions could legitimately claim jurisdiction under their current designation orders, constitutions, or jurisdictional practices. This theoretical suggestion for a different meaning and application of section 154(1) is so unlikely as to be virtually impossible.

30. The other asserted use of section 154, as an avenue that only the currently designated Employee Bargaining Agency can use in order to immunize itself from any Ministerial amendment to its designation, appears quite unlikely on the language of the section. Even if the language could be said to support this interpretation, no rational policy for such a reading is evident. It is difficult to discern the policy thrust behind an interpretation that holds that the section is there to allow the currently designated Employee Bargaining Agency to attempt to protect itself from Ministerial change to its bargaining rights, and to do so by establishing the double majority required by section 154(2), while at the same time denying an employee bargaining agency the right to apply to be able to exercise the same bargaining rights by establishing the same double majority. For any employee bargaining agency that can satisfy the Board that it represents a majority of affiliated bargaining agents, which hold bargaining rights for the majority of employees, it should be able to become authorized legally to bargain on their behalf. This is not to suggest that the designated Employee Bargaining Agency cannot utilize section 154; only that other employee bargaining agencies can as well.

31. To adopt the International’s interpretation would have the effect of overriding the legislative direction that makes the Minister’s power to amend designations subject to the certification by the Board of an Employee Bargaining Agency. If the International is correct, then once a designation issued, only the designated Employee Bargaining Agency would be entitled to apply to become certified as the Employee Bargaining Agency. On this theory, a designation order would itself have the effect of precluding an entity not designated from applying to be certified. In practical terms, the exercise of the designation authority of the Minister would preclude any certification by the Board inconsistent with the designation, yet it is clearly the intent of sections 153(5), 154(1), and 156 that Ministerial designations constitute only one method of becoming the Employee Bargaining Agency, and that that method be subject to an override by a certificate.

32. For all these reasons, the Board issued the “bottom line” decision of February 18, 1998, concluding that the OPC was an “employee bargaining agency” within the meaning of section 151(1) of the Act and was entitled to apply to be certified under section 154(1) of the Act.

33. When the hearings in these applications resumed, on April 16, 1998, the Board dealt with whether the OPC met the requirements of section 154(2). Again, section 154(2) reads:

Where the Board is satisfied that a majority of the affiliated bargaining agents falling within the provincial unit is represented by the employee bargaining agency and that the majority of affiliated bargaining agents holds bargaining rights for a majority of employees that would be bound by a provincial agreement, the Board shall certify the employee bargaining agency.

34. There were some additional facts placed before the Board, but they again were agreed to, and no *viva voce* evidence was heard.

35. It is worth setting out some of the facts. Prior to 1978, the OPC, by virtue of both its constitution and the constitution of the International, had represented all the locals for many years, and since 1973, had represented them in provincial bargaining in the province. In 1975, the OPC was accredited by the Board for bargaining on a provincial scope. During this period, the International had a very limited role in provincial bargaining, but it did hold some bargaining rights in its own name.

36. After 1978, and after the Minister had designated the combination of the International and the OPC as the Employee Bargaining Agency for these two trades (i.e. bricklaying and terrazzo, tile and marble), the OPC nevertheless remained the entity that was the active and predominant negotiator for the provincial agreements, although both the OPC and the International signed each provincial agreement. In 1985, the OPC was certified by the Board as a “council of trade unions”, within the meaning of section 12 of the Act.

37. In June, 1997, an OPC Convention was held for both trades. The Convention was called and held pursuant to the appropriate procedures under the constitutions of both the International and the OPC. Also according to those constitutional provisions, delegates were chosen to attend. A Resolution was passed at the Convention, which read, in part, as follows:

“The Executive Board is directed to take all legal and political action necessary to remove the International Union from the provincial bargaining designations.”

38. The Minutes of the Convention show that this Resolution was passed by the delegates, with no indication that any delegates opposed it.

39. When the instant applications were filed, the OPC was directed by the Board to serve a copy of the application on every affiliated bargaining agent in the province, and in turn, the affiliated bargaining agents were directed by the Board to file responses, if they wished to participate in the applications or wished to receive further notice of them. In response, three affiliated bargaining agents (Locals 6, 7 and 25) filed representations indicating opposition to the applications, and asking that the International not be removed from provincial bargaining.

40. There are sixteen affiliated bargaining agents in the province with respect to these trades: the International, the OPC, and Locals 1, 2, 4, 5, 6, 7, 10, 12, 20, 23, 25, 28, 29 and 31. Four of them, including the International, have indicated opposition to the applications of the OPC to remove the International as part of the Employee Bargaining Agency.

41. Given the Resolution that was passed at the Convention and the fact that the Convention took place relatively recently, and given the notice provided in these proceedings to all the affiliated bargaining agents and the fact that only four of them have indicated they are opposed to these applications, the Board concludes that a majority of the affiliated bargaining agents support the instant applications.

42. The first question under section 154(2) is whether the OPC has satisfied the Board that “a majority of the affiliated bargaining agents falling within the provincial unit are represented by the employee bargaining agency”.

43. The OPC argues that it has, since at least 1978, “represented” *all* the affiliated bargaining agents in the province, by virtue of the designation order naming it as part of the Employee Bargaining Agency, and by operation of law. It asserts that the effect of being designated is that the Employee Bargaining Agency is legally entitled to and required to represent all affiliated bargaining agents, regardless of the wishes of the particular affiliated bargaining agent. Further, given the constitutional provisions of the International and the OPC, it is the OPC, and not the International, that in fact has

represented all the affiliated bargaining agents in bargaining, since 1973. The OPC submits, therefore, that it “represents” all the affiliated bargaining agents. It also asserts, with respect to the second majority necessary under section 154(2), that it therefore represents *all* the employees who would be bound by a provincial agreement, by virtue of its representation of all of the affiliated bargaining agents.

44. The International relies upon the same statutory provisions and designation orders, but to opposite effect. It submits that the Employee Bargaining Agency is not, by operation of law, and regardless of the constitutional provisions and the actual conduct of provincial bargaining, only the OPC. Both the OPC and the International are part of the designated Employee Bargaining Agency, and therefore both together, and indivisibly, represent all the affiliated bargaining agents. It is the designated Employee Bargaining Agency (the OPC and the International) that owes the duty to represent fairly under section 167, and not only the OPC. It is the designated Employee Bargaining Agency (the OPC and the International) that must execute and sign the provincial agreements, not only the OPC. It is the designated Employee Bargaining Agency (the OPC and the International) that has represented all the affiliated bargaining agents, not only the OPC. The International essentially repackages and reasserts the position it took with respect to the preliminary issue (the parties did not have the Board’s reasons for its “bottom line” decision when these submissions were reasserted), that a part or component of a designated Employee Bargaining Agency *cannot*, as a matter of law, “represent” the affiliated bargaining agents, since as a matter of law it is only the designated Employee Bargaining Agency itself which is legally able to do so.

45. Without repeating the analysis and comments made above in disposing of the preliminary issue, again the Board turns to the language of section 154, and the policy purpose behind it. This section is in the Act to provide a vehicle by which an employee bargaining agency, which has in fact been representing affiliated bargaining agents, can apply to the Board to be certified to replace or supplant the designated Employee Bargaining Agency. This labour relations purpose can be derived from the overall scheme of the legislation, and more particularly, in the use of the phrase, in section 154(1), “whether designated or not”, in the imposition in section 154(1) of an open period outside which such applications are not permissible and the linking of that open period to the termination date of the provincial agreements, and in the approach taken in section 154(2) itself.

46. The language used in section 154(2) is instructive. The Board is to be satisfied that a majority of the affiliated bargaining agents are “represented” by the employee bargaining agency. To give this section meaning consistent with its purpose, this cannot be reference only to the designated Employee Bargaining Agency, and its representation rights. A majority of the affiliated bargaining agents are always by law represented by the Employee Bargaining Agency in provincial bargaining, and by no other entity. The statutory scheme mandates this. To read section 154(2) in this fashion would render the section essentially meaningless since an employee bargaining agency (not so designated) could never, by law, claim to alone “represent” any affiliated bargaining agent in provincial bargaining.

47. The interpretation consistent with both the language and policy of the section is to read the first majority referred to in section 154(2) as meaning that a majority of the affiliated bargaining agents are “represented” by the employee bargaining agency, if also “represented” by the International, when together both unions represent the affiliated bargaining agents through the vehicle of being designated together.

48. The affiliated bargaining agents are therefore “represented” by both the OPC and the International, within the meaning of section 154(2). It matters not that the constitutions of the International and the OPC have given the OPC the sole right and obligation to represent the affiliated bargaining agents, it matters not that the Board accredited the OPC in 1975, and it matters not that the Board certified the OPC as a council of trade unions in 1985. Nor does it matter that *de facto* the OPC

has been representing the affiliated bargaining agents in provincial bargaining, even subsequent to the imposition of the province-wide scheme. Regardless of these other circumstances or events, and indeed despite them, the Ministerial designation itself entitled and obligated the OPC to “represent” all the affiliated bargaining agents in the province, albeit it was required to do so along with the other half of the Employee Bargaining Agency, the International.

49. That the OPC can claim it “represents” the affiliated bargaining agents by virtue of the designation of it as part of the Employee Bargaining Agency is not, however, sufficient to meet the first majority required in section 154(2). The OPC must demonstrate more than the fact that it represents the majority of the affiliated bargaining agents in bargaining. For the Board to be satisfied, it must also demonstrate that it represents a majority of the affiliated bargaining agents for purposes of the applications themselves. Section 154 provides a procedure by which an employee bargaining agency, supported by the majority of the affiliated bargaining agents which it represents (which in turn hold bargaining rights for the majority of employees who would be covered by the provincial agreement), can seek to become the Employee Bargaining Agency, the only Employee Bargaining Agency authorized to represent the affiliated bargaining agents. The first majority required by section 154(2) is designed to ensure that the majority of affiliated bargaining agencies actually support the attempt to change the exclusive provincial bargaining agent. This is why a majority of support from the affiliated bargaining agencies is required *for the applications themselves*, and why a demonstration only that the applicant represents in bargaining all the affiliated bargaining agents will be insufficient.

50. If an employee bargaining agency could meet the first majority test solely on the basis of its statutorily authorized role in bargaining, then virtually every union that is part of a designated Employee Bargaining Agency could apply under section 154. For many designations, the International and the provincial representative body together comprise the designated Employee Bargaining Agency. If this status was all that was demanded in order to establish representation of the majority of the affiliated bargaining agents, then every International could apply to be certified as the Employee Bargaining Agency, as could every provincial representative body, provided in each case the International or the provincial body was part of the designation. Indeed, one component of the designated entity could apply to be certified, and be successful, only to have the other union apply the next day. On this theory, both unions would, by virtue of being part of the designation, meet the requirements of section 154(1) and (2). An interpretation of the section that makes no assessment of the wishes of the affiliated bargaining agencies would undermine the intent of the section.

51. On the facts, the Board is satisfied that a majority of affiliated bargaining agents support the instant applications. The Resolution passed at the Convention was quite specific, and reflects support for actions specific to the removal of the International from the designations. The instant applications clearly constitute steps to accomplish that end. The Convention was held relatively close in time to the applications being filed, and it can be reasonably inferred that they still represent the wishes of the affiliated bargaining agents. If any doubt existed that a majority of the affiliated bargaining agents supported these applications, it would have been removed when only four of them, including the International, registered any objection to the applications. It is extremely probable and a logical inference in the circumstances that only affiliated bargaining agents that have indicated so in these proceedings are not supportive of these applications.

52. The affiliated bargaining agents which are in support of these applications are therefore Locals 1, 2, 4, 5, 10, 12, 20, 23, 28, 29 and 31 (not all the affiliated bargaining agents in the designation order continue to exist as active locals). These affiliated bargaining agents do represent a majority of those represented by the OPC.

53. The next question is whether this majority of affiliated bargaining agents (those in favour of these applications) “holds bargaining rights for a majority of employees that would be bound by a provincial agreement”.

54. The Board must be satisfied that the majority of affiliated bargaining agents supporting the applications *also* hold the bargaining rights for the majority of employees. The Board is not asked to ascertain the wishes of individual employees, as to whether they support the applications. The wishes or preferences of the employees represented by each affiliated bargaining agent are an internal union matter, presumably canvassed by the affiliated bargaining agents when delegates were selected to the June, 1997 Convention, or even when individual affiliated bargaining agents made the decision to support or oppose the instant applications. Perhaps employee wishes were assessed in some other fashion or not at all. In any event, section 154 leaves it to the affiliated bargaining agents to make the decision as to what position to take. Section 154(2) requires only that those affiliated bargaining agents in favour of the application also *hold bargaining rights* for a majority of employees. Section 154 provides a platform on which to consider the interplay between the bargaining or representative entities. It does not provide a mechanism which assesses or seeks to assess the wishes of individual employees, except indirectly insofar as the affiliated bargaining agents accurately represent those wishes.

55. Had the Legislature intended otherwise, it would have been simple to stipulate that employee wishes were to be considered in some fashion, through a required vote or an option to hold a vote, or through any expression that suggested that employee wishes ought to be a factor under this section. To the contrary, section 154(2) is quite clear and speaks only to whether the affiliated bargaining agents in question “hold[s] bargaining rights for a majority of employees ...” The Board is to be satisfied with respect to representational rights, and whether the supporting affiliated bargaining agencies represent the majority of employees.

56. In order to make the determination of whether the majority of affiliated bargaining agents hold the bargaining rights for the majority of employees, the assessment must be made with reference to some particular point in time. The number of employees represented by the affiliated bargaining agents will fluctuate over time, as new employers become organized by the unions, or as work forces ebb and flow. Terminations of existing bargaining rights will not come into play, since the open period for applications under section 154 ends before the beginning of the open period for terminations in this sector, unless the Board were to focus on a time, for ascertaining this majority, after the end of the open period under section 154(1).

57. In determining the appropriate focal point, the open period in section 154(1) is helpful. It seems both appropriate and fair to make the assessment as to whether the affiliated bargaining agents in question hold bargaining rights for the majority of employees with reference to this same period, a period set by the Legislature as being appropriate for bringing these applications, and a period ending 120 days before the end of the provincial agreements. It is that period that the Board will focus on.

58. The application date itself would seem to be the most logical, appropriate, and fair date, within the open period, at which to assess whether the majority of bargaining rights are held by the majority of affiliated bargaining agents in support of the applications. No other date, or principle for picking a date, suggests itself.

59. In light of the fact that twelve out of sixteen affiliated bargaining agents support the application, or eleven out of fourteen, if one were not to count the OPC or the International in this tally, and that the majority of 11 or 12 includes Local 2, which the Board understands has the largest number of members of any affiliated bargaining agent in the province, it is exceedingly likely that the majority of affiliated bargaining agents also hold bargaining rights for the majority of employees who would be covered by a provincial agreement. This is the logical inference on the facts. Nevertheless, the

submissions at the last day of hearing did not focus on this point, and the Board will afford a further opportunity to the parties to address this issue, and to submit any facts that might suggest otherwise.

60. Because it appears so likely that the applicant satisfies this requirement, and because it is such a logical inference on the evidence which is before the Board, the Board will certify the OPC as the Employee Bargaining Agency unless a party asserts that this inference is incorrect, and provides sufficient information in support of this assertion. If within ten days from the date of this decision no representation is received to the contrary with respect to this fact (whether the majority of affiliated bargaining agents who support this application, as found above, also hold bargaining rights for the majority of employees) then the Board will issue the certificates forthwith.

61. However, if the International or Locals 6, 7, or 25 wish to contend otherwise, and wish to assert that the affiliated bargaining agents in support of these applications did not as of the application date hold bargaining rights for the majority of employees who would be bound by the provincial agreement, then any of these parties shall file with the Board, within the same ten days, and deliver a copy of their material directly to all the other parties, *all* representations they might wish to make in this respect. Upon such filing(s), the certificates will not automatically issue.

62. The OPC shall have seven days to respond to any submissions so filed, and to submit all representations in support of its position as well, and it also shall deliver its submissions directly to the other parties. In turn, any party which initially filed representations within the first ten day period shall have a further seven days in order to file and deliver a reply to the OPC submissions.

63. Finally, the Board may deal with this remaining aspect of these applications solely on the basis of the written representations, without a hearing or any further opportunity to make representations.

64. This matter is referred to the Registrar.

0013-98-U; 0014-98-U Joseph Portiss, Applicant v. Labourers' International Union of North America Local 1089, Robert Leone, Rick Vani, Gerry Varricchio, Frank Guerette, Victor Horvath, Frank Vennari, Rick Weiss, Enrico Mancinelli, Responding Parties; William Nixon, Applicant v. Labourers' International Union of North America Local 1089, Robert Leone, Rick Vani, Gerry Varricchio, Frank Guerette, Victor Horvath, Frank Vennari, Rick Weiss, Enrico Mancinelli, Responding Parties

Construction Industry - Duty of Fair Representation - Intimidation and Coercion - Practice and Procedure - Unfair Labour Practice - Witness - Applicants seeking to withdraw unfair labour practice complaints due to alleged threats to witnesses - Board not permitting applicants to withdraw and directing them to file particulars of alleged threats within 10 days

BEFORE: *G. T. Surdykowski*, Vice-Chair.

DECISION OF THE BOARD; April 30, 1998

1. By decision dated April 22, 1998, the Board ordered the applicants in these complaints to provide further particulars of their allegations.

2. The Board is in receipt of two letters, one in each complaint, from the applicants' representative. Although both letters are dated April 21, 1998, they were faxed to the Board on April 27, 1998. Accordingly, it is not clear whether the applicants had received the Board's April 22, 1998 decision when they wrote to the Board.

3. In Board File No. 0013-98-U, the applicant writes as follows:

I am writing in reference to File #0013-U-98 Joseph Portiss v. Labourers' International Union of North America Local 1089 Robert Leone, Rick Vani, Gerry Varricchio, Frank Guerette, Victor Horvath, Frank Vennari, Enrico Mancinelli and Rick Weiss.

On behalf of Mr. Portiss I hereby notify you of Mr. Portiss' decision to withdraw the following sections from his complaint and all information pertaining to such sections; Sections 74, 75, 76, 93, 149.

Mr. Portiss is withdrawing section 75 as he realizes this violation should be considered non-compliance of the OLRB order from 1983. Mr. Portiss withdraws Sections 74, 76, 93, 149 *due to potential danger that some witnesses are being subjected to.*

Unfortunately, it appears that Mr. Leone is exercising further misconduct in the form of issuing *physical threats which in my opinion may result in undue harm to specific witnesses.*

Therefore, Mr. Portiss withdraws the above sections *not by choice, but by obligation to these witnesses.*

Further, Mr. Minsky has requested further particulars on the allegations made towards his clients and I have agreed to provide such particulars no later than May 01, 1998. Mr. Minsky also requested an additional time to respond to the allegations therefore, I would be in agreement to receiving Mr. Minsky response no later than May 11, 1998 if you should deem fit.

Thank-you for your time and co-operation.

[emphasis added]

4. In Board File No. 0014-98-U, the applicant writes as follows:

I am writing in regard to file #0014-U-98; William Nixon vs. Labourers' International Union of North America Local 1089, Robert Leone, Rick Vani, Gerry Varricchio, Frank Guerette, Victor Horvath, Frank Vennari, Enrico Mancinelli and Rick Weiss.

On behalf of Mr. Nixon I am withdrawing the following sections and information pertaining to such sections; Section 74, 75, 77.

Unfortunately, it appears Mr. Leone has exercised further *misconduct that in my opinion may result in physical harm to witnesses*, therefore Mr. Nixon is withdrawing these sections *out of obligation to the safety of the witnesses and not by choice.*

Further Mr. Minsky has requested particulars which I have agreed to forward to him no later than May 01, 1998 and therefore I also agree with Mr. Minsky's request for additional time to respond to the allegations and expect Mr. Minsky to deliver his response no later than May 11, 1998 if you should deem fit.

Thank-you for your time and co-operation.

[emphasis added]

5. Generally, the Board is liberal in its approach to requests to withdraw part or all of complaints such as these at the pre-hearing stage. Unless an objection supported by cogent reasons is made, leave to withdraw will generally be granted.

6. The requests in these complaints raise some concerns, however. It appears that each of the applicants requests leave to withdraw parts of their respective complaints because of alleged unspecified threats, intimidation or coercion. Such conduct is expressly prohibited by the *Labour Relations Act, 1995* (see sections 87(2) and 76), and also raises concerns regarding access to and the integrity of the Board's processes. It also raises questions of contempt.

7. The Board is therefore not prepared to grant the applicants' requests at this time. Instead, the Board directs the applicants to deliver particulars of the alleged threats and potential danger to witnesses referred to in their April 21, 1998 letters. These particulars are to be delivered to the Board within ten (10) days of the date herein.

8. If the applicant cannot deliver particulars of the conduct alleged in their April 21, 1998 letters as directed, the Board may consider them to be without foundation and they may be dismissed.

0302-98-R United Steelworkers of America, Applicant v. Richards-Wilcox Canada Inc., Responding Party

Certification - Evidence - Membership Evidence - Union applying for certification and submitting membership evidence signed more than 6 months, but less than one year, prior to application date - Board directing representation vote

BEFORE: *Sharon C. Laing*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

DECISION OF SHARON C. LAING, VICE-CHAIR AND BOARD MEMBER R. R. MONTAGUE; April 27, 1998

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act, 1995*.

3. The employer in this matter submits that the applicant has not obtained the requisite forty percent support of its proposed bargaining unit, pursuant to section 8(2) of the Act. It is submitted that the membership evidence submitted by the union may not represent evidence of employees working at the specific location applied for in the application and/or may be representative of individuals who were on indefinite layoff on the date of the application. In addition, the responding party takes issue with the timeliness of the membership evidence if it is dated more than six months prior to the application date.

4. The Board has confirmed, based on the material filed by both parties, that the membership evidence filed relates to the location sought by the union in its application.

5. The membership evidence relied upon by the applicant consists of membership cards which were signed more than six months but less than one year, prior to the application date. The Board's practice in dealing with the timeliness of membership evidence was set out in *Charterways Transportation*, [1979] OLRB Rep. Nov. 1068:

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5. The membership evidence filed by the applicant indicates that the last monetary payment

to the applicant by any employee in the bargaining unit was made in January of 1979, that is more than six months but less than a year prior to the application date. The Board's long standing practice in such situations is to exercise its discretion under section 7(2) of the Act and direct the taking of a representation vote. See: *W.N. Construction (Ottawa) Ltd.*, [1986] OLRB Rep. Sept. 645. We are not satisfied that the circumstances of this case warrant a departure from this practice.

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6. More recently, the Board in assessing combination application for membership/membership cards in the context of a certification application observed the following in *Sudbury and District Health Unit*, [1997] OLRB Rep. Jan. 139:

Given the statutory changes in the Act as a result of Bill 7 and the Board's practice, in our view the Board may properly have regard to membership evidence in the form of "combination" cards which were signed between six months and one year prior to the date of application.

7. In the circumstances and having regard to the Board's comments cited above, it appears to the Board on an examination of the evidence before it, that not less than forty per cent of the individuals in the bargaining unit proposed in the application for certification were members of the union at the time the application was made.

8. The Board directs that a representation vote be taken of the individuals in the following voting constituency:

all employees of Richards-Wilcox Canada Inc. in the City of Mississauga, save and except forepersons and persons above the rank of foreperson, office, clerical and sales staff.

9. The vote will be held on April 29, 1998. Other vote arrangements will be as determined by the Registrar and set out on the attached "Notice of Vote and of Hearing".

10. All individuals who had an employment relationship with the responding party in the voting constituency on April 22, 1998, the certification application filing date, are eligible to vote. Employees having an employment relationship on April 22, 1998, the certification application filing date, include employees who were not at work on that date, so long as there is a reasonable expectation of their return to employment.

11. There may be a dispute between the parties as to whether or not group leaders, supervisors and those above the rank of supervisor should be included in the bargaining unit. If any individual holding such a position wishes to cast a ballot, the individual shall identify himself or herself as occupying a disputed position and such individual shall then be entitled to cast a ballot. Any ballot cast by such an individual shall be segregated and not counted until the Board so orders or the parties agree.

12. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

13. The responding party is directed to post copies of this decision and of the "Notice of Vote and of Hearing" adjacent to each of the posted copies of the "Notice to Employees of Application for Certification". These copies must remain posted for 30 days.

14. Any party or person who wishes to make representations to the Board about any issue remaining in dispute which relates to the application for certification, including any matters relating to the representation vote, must file a detailed statement of representations with the Board and deliver it to the other parties, so that it is received by the Board within seven days (excluding Saturdays, Sundays and holidays on which the Board is closed) of the date on which the vote is taken.

15. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER J. A. RUNDLE; April 27, 1998

1. The majority of the membership evidence relied on in this case consists of membership cards which were signed well in excess of six months, but less than one year, prior to the application date.
 2. At a point in time where the legislation provides, as a matter of course, the determination of representation rights through the holding of representation votes it is not sufficient to cure such untimely membership evidence, which may be characterized as deficient, through the same mechanism.
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3379-97-FC; 3534-97-R; 3608-96-U United Steelworkers of America, Applicant v. **Saxum Canada Incorporated**, Responding Party; Rick Wazid, Applicant v. United Steelworkers of America, Responding Party v. Saxum Canada Incorporated, Intervenor

First Contract Arbitration - Practice and Procedure - Termination - Group of employees filing termination application nine (9) days after union's application for first contract arbitration filed with the Board - Board deciding to hear first contract application before considering termination application

BEFORE: *Timothy W. Sargeant*, Vice-Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *James Hayes* for the applicant United Steelworkers of America; *Sandra Hinksman* for the applicant *Rick Wazid*; *F. G. Hamilton* for the responding party.

DECISION OF TIMOTHY W. SARGEANT, VICE-CHAIR AND BOARD MEMBER, R. R. MONTAGUE; March 4, 1998

1. A hearing was held on January 22, 1997 to determine a preliminary issue between the parties. File 3379-97-FC is an application for a first contract made pursuant to section 43 of the Act. File No. 3534-97-R is a termination application made pursuant to section 63 of the Act. The first contract application was received by the Board on December 10, 1997. The termination application was received by the Board on December 19, 1997. The issue between the parties for the purpose of this interim decision is whether the first contract application or the termination application should be heard first.

2. The representative of the employees who brought the first termination application and the employer take the position that the termination application should be heard prior to the first contract application. The union on the other hand, takes the opposite view, and is of the opinion that the first contract application should be heard first.

3. The issue arises pursuant to section 43(23) of the Act. This states:

43. (23) Despite subsection (2), where an application under subsection (1) has been filed with the Board and a final decision on the application has not been issued by it and there has also been filed with the Board, either or both,

- (a) an application for a declaration that the trade union no longer represents the employees in the bargaining unit; and

- (b) an application for certification by another trade union as bargaining agent for employees in the bargaining unit,

the Board shall consider the applications in the order that it considers appropriate and if it grants one of the applications, it shall dismiss any other application described in this section that remains unconsidered.

4. There is no argument between counsel for the employer and counsel for the union that the Board is given a discretion under section 43(23) as to which application it should hear first. The only difference between the counsel on this point is that counsel for the union argues that in the normal course the application filed first should be the application heard first. Counsel for the union does not dispute, however, that the Board is given a wide discretion under section 43(23) to determine which application the Board considers appropriate to be heard first.

5. The decision on this issue has an obvious impact. If the Board hears the termination application prior to the first contract application and the termination application is successful then pursuant to section 43(23) the first contract application would be dismissed. On the other hand, if the Board hears the first contract application first and it is successful then the termination application would be dismissed.

6. No evidence was led through witnesses at the interim hearing held on this issue. The parties argued on the basis of the pleadings filed. At the outset it should be noted that counsel for the union took the position that the pleadings were only pleadings and as such were not evidence. With this caveat counsel for the union did not object to the issue being argued based on the pleadings.

7. It was pointed out by counsel for the employer that there is no application before the Board that the employer has bargained in bad faith contrary to section 17. Further, counsel for the employer pointed out that there is no allegation that the termination application was initiated by the employer within the meaning of section 63(17) of the Act or that the termination application is untimely. Counsel for the union pointed out that there is no application before the Board that the first contract application did not disclose a *prima facie* case.

8. Certification was achieved in December 1996. The vote in favour of the trade union was 22 to 15. In its response to the termination application the trade union submitted "the responding party submits that the vote should be postponed pending disposition of the first contract application (Board file 3379-97-FC) filed on December 10, 1997." The termination application is alleged to have the support of 28 out of 29 employees.

9. From the pleadings filed, the union was notified as early as September 16, 1997 of the employees' intention to file a termination application. A letter to the union from a representative of the employees stated in part that:

"we feel misled and betrayed and are asking that we have the opportunity to vote whether to continue having R.W.C. represent us or not. We feel we are entitled to such democratic rights at the first anniversary of the inception of the Union. Also we request that the R.W.C. do not sign any agreement with Saxum Canada Inc. before the vote is mentioned is held."

10. On September 18, 1997, Robert McKay, a National Representative of the Union answered this letter in part:

"No collective agreement will be signed by the union until you have had a chance to vote on it.

You will make the decision on your contract by secret ballot".

11. On December 5, 1997, a representative of the employees again notified the union of the employees' intention to file an application for decertification:

You will be receiving, in the next few days, an application for decertification.

12. There is no issue that a number of bargaining meetings took place between the parties. These were held on February 24, March 17, April 7, April 18, May 26, June 25, August 14, September 17, October 9 and 27, 1997.

13. In the letter sent by Mr. McKay dated September 18, 1997, referred to earlier, he did state in regards to negotiations that:

"we are very close in resolving the outstanding issues. We had planned to meet again on October 9, 1997. I feel confident that we will be able to resolve the issues at the bargaining table."

14. Without reviewing in detail, the application for the first contract it does allege among other matters that on behalf of the employer there was:

- (a) a refusal to provide the information to the union;
- (b) an uncompromising position in bargaining issues taken by the employer without reasonable justification. For example, to cite two examples:
 - (i) wages; and
 - (ii) the scope of the bargaining unit;
- (c) a refusal of the company to recognize the bargaining authority of the union.

The applicant submits it is entitled to a first contract direction pursuant to section 43(2)(a), (b), (c) and (d) of the Act.

15. Counsel for the employer and counsel for the union agree that the issue before the Board is one of process and procedure. As stated before, both parties agree that the Board has discretion to determine which application should be heard first.

16. The representative of the employees argued that the employees wishes should be respected. The representative points out that the union has known since September 1997 that the employees did not wish the union to represent them and that the employees wished to have a decertification vote as soon as possible. The representative argues strenuously that the employees have done nothing wrong and there should be no delay to having their rights heard. The representative asks why, if as the union has stated in the constitution it believes in democracy, it does not agree to a vote in these circumstances. The representative for the employees submits a vote should be held as soon as possible and that the employees should not have to delay their application to hear the outcome application for first contract. The cost involved and the delay would serve no purpose. Employees already feel frustrated in that they have been prevented by the Act from applying for decertification until a year had passed. The representative of the employees submits the union was fully aware of this fact, and in the circumstances the decertification application should be heard first.

17. Counsel for the employer set out a number of arguments under the following headings:

- (1) There are new employee rights under Bill 7 which should be considered in determining how to apply the Board's discretion in this matter.

- (2) Reference to the provisions in the Act concerning the order of procedure;
- (3) There are no statutory provisions governing which application should proceed first and the Board has discretion how this matter should be exercised;
- (4) The facts of the case and;
- (5) Reference to the Board's decisions.

18. Employer counsel submits that under Bill 7 there are new employee rights conferred by this Act. Reference can be made to many sections of the Act, for example, the Act now requires the trade union to conduct both strike votes and ratification of contract votes with employees. These new rights confirm that a trade union has to represent employees and that it cannot act contrary to the wishes of the employees. Counsel for the employer points out that in a termination application, the employees do not have to prove it is voluntary. The only restriction is found in section 63(17) and this deals with the issue of whether the employer initiated such application. After a year has passed there is an unfettered right for employees to apply for decertification. In counsel's submission there must be a primary recognition given to the importance of employee rights under the Act. In counsel's view a termination application as it deals with representation rights deals with fundamental rights under the Act. In this context such a fundamental right should be determined prior to the application for first contract. Counsel submits that a first contract application is a one time application and is specific to a one time situation. Further counsel argues a first contract application depends on the assumption that the union has the support of the employees. In this instance obviously the union does not have such support. The purpose of section 43 in counsel's view is to ensure that the employer bargains fairly. The section is not designed to defeat employee rights. The application for termination in counsel's view is a superior type of application as it deals with basic rights and therefore in this instance should be heard first.

19. Company counsel submits that under section 43(23) the Board has a discretion right up to a final decision to determine which application should be heard first. The wording of this section obviously contemplates that it does not matter who is in the door first in terms of the date of application. Therefore, the Board should consider what makes industrial relation sense in exercising the discretion under Section 42(23). Surely if the union does not have support of the employees then it is not appropriate to continue with the union agency relationship. Further the Board should consider the rights that employees might lose if the first contract application is successful. Obviously the employee would lose the right to ratify a collective agreement, would lose the right to vote on a strike and lose the right to strike. Furthermore, it might be some two years after the date of the first contract arbitration before the employees would get another chance to decertify. This could result in real terms in delay of some three and a half to four years by the time the arbitration is completed before the employees would have a right to decertify. In counsel's view, labour relations delayed is labour relations denied. The facts before the Board illustrates there is nothing the employees have done to defranchise themselves. It is obvious, therefore, given the employees notification to the union, given the letters to employees from the union, and given that the first contract application was filed just days before the termination application that the first contract application was filed tactilly to defeat the employees' rights in this situation. When one contrasts the pleadings in the application for first contract with the letters written to employees by the union, such comparison supports the conclusion that the first contract application was filed to defeat the employees' application. There is nothing in the letters written by the union to the employees to suggest the company would not recognize the union or would not move on bargaining issues. There is nothing in these letters that criticizes the company's behaviour or makes the suggestion that the employer was acting improperly. This is in stark contrast to the application for first contract where such allegations are raised.

20. Further counsel for the employer points out there is no application that there has been a failure by the employer to bargain in good faith made under section 17. The problem in this case is not with the employer or with the employees but with the union. The employees just do not wish the union to represent them. In these circumstances, counsel submits that the application for termination of bargaining rights should proceed first.

21. Counsel for the union agreed that the Board has a discretion in this matter but argued that in the normal course the union has the right to expect that the first application filed will be the first application to be heard. There is no persuasive argument before this Board to depart from this principle. Counsel argued very strenuously that many of the arguments of the employer are based on pleadings without the context of the total situation. For the Board to fully understand the situation and to appreciate the context, it must hear the evidence on the merits.

22. Without making any arguments concerning the interpretation of matters raised in the pleadings, counsel for the union submits that the first contract application raises real concerns of the union about the employer's behaviour. Counsel submits that it is evident from its pleadings that the union is concerned about surface bargaining. Counsel argues that if the allegations in first contract application were upheld, it is no wonder that employees would not be supporting a union prior to the first contract application. Counsel submits that if the bargaining is unsuccessful because the employer did not want negotiations to succeed, such conduct by the employer would necessarily affect the employees' view of union representation.

23. Counsel for the union argues that the Board has to be careful when considering the matter of discretion in this instance. If the first contract application is not successful, then of course the termination application is still alive. However, the Board should be careful because in counsel's view this is a classic case of divide and conquer. It is no answer to say before evidence has been heard on the merits, that the employees do not want the union anymore; otherwise, in essence the Board would be supporting a boot strap argument. Though counsel agrees there are new employees' rights granted under Bill 7, he nevertheless submits that the consideration of the Board under section 43(23) in exercising its discretion has not really changed. Counsel does not quarrel that representational rights are fundamental but such rights are not hierarchical in the Act. Another important right is freedom from an employer's improper interference in bargaining and the right to insist that bargaining be conducted in good faith.

24. In counsel's submissions, the Act does not require the union to operate by popularity poll. In summary, counsel argued that the first contract application had been filed first and that such application on its face raises serious issues. Further, counsel points out that there is no application before the Board that the first contract application does not raise a *prima facie* case. If the first contract application is granted, then the employer has obviously engaged in conduct falling within the meaning of section 43(2) (a), (b), (c) and (d). The union has a responsibility not to cut and run, merely because it runs into a difficult employer. In summary there is no real reason for the Board to exercise its discretion to depart from the normal practice of hearing the first application filed first.

25. In the course of argument the Board was referred to a number of cases, namely *Ingersol Plastics*, [1997] OLRB Rep. May/June 463; *Northfield Metal Products*, [1990] OLRB Rep. March 302; *Fort William Clinic*, [1996] OLRB Rep. Nov./Dec. 942 and *Knob Hill Farms*, [1991] OLRB April 521.

Decision

26. The Board recognizes that under the Act employees are given certain opportunities to express their wishes as to whether they wish a trade union to continue to bargain on their behalf. The Board also understands the frustration that employees may be experiencing. On the other hand, the Board is aware that bargaining is not always easy and at times is frustrating for all parties concerned.

Obviously there will be times when employees are not happy with the course of negotiations. This may be caused by both union and employer behaviour, but, again this is not an issue in this matter that can be determined merely on the basis of pleadings before the Board.

27. How then should the Board exercise its discretion in this instance? Certainly, the practice of the Board to-date in this type of issue has been to hear the first application filed in the normal course. The Board agrees the cases are distinguishable and each matter must be decided on its own facts. The Act clearly contemplates that the Board has discretion on this issue.

28. The Board does not take issue that there is a genuine desire of employees to have a vote to determine whether or not they wish to have the union represent them. In this case, however, the right to seek such vote is granted under the Act only after 12 months have expired from the date of certification. The Act therefore allows a trade union within that 12 months' frame to try and establish itself in the new relationship and endeavour to negotiate a collective agreement. One of the tools available to a trade union in a first contract negotiation is the right to make an application for a first contract direction. In this instance the union has exercised this right and on the face of the application it does not seem to be frivolous. Such a direction however is not automatic. For a trade union to be successful in a first contract application the Board may be convinced that collective bargaining has been unsuccessful for the reasons enumerated in section 43(2) of the Act. If the first contract application is not successful then the termination application may still be heard. Though there is a concern of the Board that the rights of the employees may in this matter be delayed depending on the outcome of the first contract application, the Board is not convinced that this delay is of such a nature as to persuade it to hear the termination application prior to the first contract application.

29. If the first contract application is successful, it would suggest that the employer's conduct right might have had a bearing on the employees attitude towards a trade union. This view is supported by section 43(23), it that such section would result in the termination application being dismissed if a first contract application is granted, even though such application is of itself timely and uncontested.

30. Though the Board recognizes the concerns of the employees involved, given that the first contract application was filed in advance of the termination application and considering the submissions of the parties, the Board has determined that it will follow its normal practice and hear the application filed first. The Board is not persuaded in this instance to exercise its discretion to hear first the second application filed. Thus the Board will hear evidence on the first contract application prior to any consideration of the termination application.

31. The hearing of the first contract application will be heard on April 1, 2, 3, 8 and 15, 1998 commencing at 9:30 a.m., in the "Board Room", 6th Floor, 400 University Avenue, Toronto, Ontario.

32. This panel does not remain seized.

DECISION OF BOARD MEMBER J. A. RONSON; March 4, 1998

1. My approach in a matter such as this remains as I expressed it in *Knob Hill Farms* [1991] April 521. My impression since then was that Bill 7 (the most recent amendments to the *Labour Relations Act*) had changed the Board's focus. But I am wrong. Nothing has changed. The wishes of the employees remain a minor factor in any exercise of the Board's discretion.

2. On the facts before us, I would proceed to hear the termination application first. By taking that path, the employees may have the opportunity to tell us just who has been 'surface bargaining'.

2845-97-JD Iron Workers District Council of Ontario and International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736, Applicants v. **The State Group Limited** and Millwright District Council of Ontario and its Local 1007, Responding Parties

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board commenting on extremely limited role of oral testimony during course of oral consultation - Ironworkers' union and Millwrights' union disputing assignment of work in connection with off-loading, moving, handling, erection, installation and welding of interlocking safety screen fencing at auto parts plant in Board Area 5 - Board concluding that disputed work ought to have been assigned to members of Ironworker' union

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. Knight* and *G. McMenemy*.

APPEARANCES: *Gary Caroline*, *Doug Smees* and *Ted Pratt* for the applicants; *Pierre Sadik*, *Claude Cournoyer* and *Ron Coltart* for the responding parties Millwright District Council of Ontario and its Local 1007; no one appearing on behalf of The State Group.

DECISION OF THE BOARD; April 27, 1998

1. This is an application respecting a work assignment dispute filed with the Board pursuant to section 99 of the *Labour Relations Act, 1995* (hereinafter "the Act"). An oral consultation was held before this panel of the Board on April 15, 1998.

2. In accordance with the Board's Rules of Procedure and the practice of the Board in jurisdictional disputes, the parties (with the exception of The State Group, which we will hereinafter refer to as "State") filed briefs in advance of the oral consultation. These briefs were very carefully reviewed by the Board prior to the oral consultation.

3. There was no substantive difference amongst the parties regarding the description of the work in dispute. That work consists of the offloading, moving, handling, erection, installation and welding of interlocking safety screen fencing at the Hayes Dana auto parts plant in Thorold, Ontario. There would appear to be no dispute that the safety screen fencing was free-standing; that is, that it was independent of the machinery or conveyors that it surrounded. The work in dispute was contracted to State, as part of a larger contract for the installation of new machinery and conveyors at the plant.

4. The assignment of the work in dispute was unusual. State initially assigned the work to members of The International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (hereinafter "the Ironworkers"). Shortly thereafter, the members of the Ironworkers were removed from the work and State reassigned the work to members of the Millwrights Union Local 1007 (hereinafter "the Millwrights"). The Ironworkers attempted, unsuccessfully, to reclaim the work for its members, and subsequently filed both a grievance with State (which was referred to the Board for arbitration), and this proceeding with the Board.

5. When determining a jurisdictional dispute complaint, the Board considers all of the factors relevant to the proper assignment of the work. As a general observation, the Board has historically given consideration to certain factors which include the following:

- (a) employer practice and preference;
- (b) area practice;
- (c) trade agreements;
- (d) collective agreement obligations;
- (e) trade union constitutions;
- (f) skill, training and safety; and
- (g) economy and efficiency.

In any particular case, one or more of these factors may be of special significance, and will be given greater weight than other factors. Having reviewed the briefs filed by the parties prior to the oral consultation, the Board advised counsel at the outset that it was unnecessary to hear any submissions from them regarding the factors of collective agreement obligations, trade union constitutions, skill, training and safety, or economy and efficiency, which were all neutral factors as between the two unions.

6. Accordingly, counsel focused their submissions on the factors of employer and area practice, and trade agreements. We will deal with each of these factors below. Before doing so, however, we wish to briefly address one aspect of the oral consultation process, namely the ability of the parties to call oral evidence. This issue arose during the submissions made by counsel for the Millwrights, who indicated that the materials relied upon by the Ironworkers in its reply brief told only half the story. Accordingly, counsel indicated his desire to call oral evidence through Mr. Coltart (a business representative for the Millwrights) to rebut the written assertions made by the Ironworkers. Counsel for the Ironworkers expressed concern about entertaining such evidence, as it put his client at a disadvantage in the circumstances.

7. Ultimately, we indicated to counsel for the Millwrights that we would permit him to assert what Mr. Coltart would say had he been able to testify, and we advised the parties that if those assertions had an effect on the proceeding, we would hear the testimony and permit cross-examination. This was acceptable to opposing counsel. At the end of the day, it has been unnecessary to deal with the question of how the hearing of such testimony would have been effected.

8. We make the following observation for the benefit of the labour relations community. Counsel for the Millwrights indicated that he had believed that he could call oral evidence at the consultation to deal with the alleged frailties of the Ironworkers' materials on the basis that "the buzz on the street" was that the Board was providing more latitude in that regard at oral consultations. The "buzz on the street" is wrong. For reasons which are all too obvious and unnecessary to recount here, the Board is extremely hesitant to entertain oral testimony during the course of an oral consultation. The consultation process was enacted over five years ago to remedy the historically established failings of work assignment dispute hearings and, for the most part, it has worked.

9. It is the experience of this panel of the Board that in virtually every work assignment dispute filed with the Board one or more of the parties now "reserves the right" to call oral evidence with regard to one or more parts of the case. There is no "right" to "reserve". The discretion of the Board to entertain oral evidence in a work assignment proceeding has been, and will continue to be, exercised extremely sparingly. In fact, the Act does not require an "oral" consultation and the Board has the authority to determine work assignment proceedings without convening an oral consultation at all. In that light, parties to work assignment disputes must include in their briefs all of the materials they want the Board to consider. The parties must be prepared to have a jurisdictional dispute determined on the basis of the written materials alone.

10. In this case, the Board noted that the reply brief filed by the Ironworkers was delivered to counsel for the Millwrights approximately two weeks before the date scheduled for the oral consultation.

Reply briefs are not specifically identified in the Board's Rules but are almost invariably filed by the applicant in work dispute proceedings and usually there is no controversy created by the filing of such a pleading. In this case, counsel had more than sufficient time to reduce to writing the statements that Mr. Coltart was prepared to make in response to the materials filed by the Ironworkers, and to deliver these to the other parties and the Board.

11. Returning to the merits of the proceeding, we will comment first on the question of employer practice. A dispute arose on the materials filed with the Board regarding the ability of the Ironworkers to rely upon the past practice of Canal Contractors, which is a division of State. Counsel for the Millwrights asserted both at the oral consultation and in his brief that the practice of Canal Contractors (hereinafter "Canal") ought not to be considered the practice of State. At the oral consultation, counsel asserted that State operates side-by-side with Canal, separately. Counsel for the Ironworkers disputed that assertion, and noted that there was nothing in the materials filed by the Millwrights establishing such an assertion.

12. Ultimately, it was the submission of the Millwrights that the same principles that apply to sale of a business applications brought before the Board ought to apply in work assignment disputes; that is, that the Ironworkers, in order to be able to rely on Canal's practice, must establish that Canal has eroded the bargaining rights held as against State. In the absence of any such evidence, it was asserted that the practice of State could not include the practice of Canal.

13. We disagree with this approach. Having regard to the materials before the Board, it is apparent that there has been, to a great extent, an integration of the operations of Canal and State. The Ironworkers filed business cards for managers of Canal who are now working with State. They identify the individuals as working for the Millwrighting & Rigging" or "M & R" Division of "State Canal" or "State-Canal". Furthermore, the Millwrights' own employer practice material identifies State as working out of the same office in Stoney Creek, Ontario as "State Canal". Even more compelling is correspondence on State letterhead relied upon by the Millwrights as evidence of employer practice which is signed by one of the two business card holders referred to immediately above as being with the "M & R Division" of State. In the circumstances, we can only conclude that the operations of Canal are sufficiently integrated with those of State as to permit for the conclusion that the practice of Canal (since, of course, its purchase by State) is the practice of State itself.

14. Given that conclusion, the factor of employer practice falls in favour of the Ironworkers. Counsel for the Millwrights conceded during argument that the evidence filed by the Ironworkers was compelling, as it was Canal's practice to have Ironworkers perform the work in dispute at General Motors operations. Over and above that specific source of work, the evidence of employer practice amassed by the Ironworkers which was not challenged by the Millwrights in its materials establishes that since the early 1990's the work in dispute was performed either exclusively by members of the Ironworkers, or as a composite crew with members of the Millwrights. This corresponds with the date that the parties believed that Canal was purchased by State. The materials which support the Millwrights' claim on the basis of employer practice are typically dated before 1990, and do not speak specifically to safety screen fencing (though we are not particularly surprised that minutes of a mark up meeting for the construction of a conveyor would not specifically speak to the work in dispute). In the circumstances, the factor of employer practice favours the Ironworkers.

15. Turning to the factor of area practice, we are of the view that the materials filed do not evidence a clear area practice favouring any one trade. The parties were in agreement that the most relevant practice for the Board to consider is that followed in auto and auto parts plants in Board Area 5, the Board Area where the Hayes Dana plant is located. The difficulty in assessing the area practice materials is that there is a tendency for individuals to refer in various different ways to work which may

(or may not) be the work in dispute. The parties to this proceeding refer to "safety screen fencing", but the wider community appears to utilize numerous other names for the same (or similar) product. Accordingly, each of the trade unions could (and did) rely upon the same piece of correspondence as supporting its claim, depending upon how one read the letter.

16. Some of the materials filed by the Millwrights in support of area practice were not given much weight by the Board. For example, the Ironworkers filed a letter from Mr. Henry Miron, a Mechanical Manager with E. S. Fox Ltd., in support of its claim. In response, the Millwrights filed a letter authored by Mr. E. Spencer Fox in which he observes (incorrectly, we may add) that Mr. Miron's letter was "misleading", and in which he purports to identify the manner in which that employer assigned the work in dispute. In our view, the letter filed by the Millwrights would have been given more weight had it been authored by Mr. Miron rather than by Mr. Fox. That being said, the letter was vague enough in its content to have been unhelpful in any event.

17. The final factor addressed by counsel was that of the applicability of a trade agreement. The Millwrights relied upon the terms of the Conveyor Agreement between the parties dated June 3, 1953 (as clarified by way of Memorandum of Agreement dated June 5, 1957). The Conveyor Agreement provides for the distribution of work relating to the erection of "protective screen or metal guards". The Millwrights rely on that part of the Conveyor Agreement which reads as follows:

2. The erection of protective screen guards or other than metal guards on all other types of conveyors is the work of Millwrights.

Counsel for the Millwrights directed the attention of the Board to material filed which supports the conclusion that the Conveyor Agreement has been applied to determine the assignment of safety screen fencing work in automotive plants in Board Area 5.

18. Having reviewed all of that material, it would appear to us that the Conveyor Agreement has, on occasion, been applied by employers operating automotive plants in Board Area 5. Some of the materials filed and relied upon by the Millwrights in this regard were vague and required a certain degree of extrapolation to reach the conclusion argued by counsel. Other materials required a somewhat larger leap of faith which the Board was not willing to make. However, taken in its entirety, there can be no doubt that some employers - including State - have utilized the Conveyor Agreement to distribute work encompassed by that agreement as between members of the Millwrights and the Ironworkers in Board Area 5.

19. The difficulty which we have, in this instance, in giving determinative weight to the Conveyor Agreement is that it is not evident to us that the Conveyor Agreement has ever been utilized to assign the work in dispute in Board Area 5. There is nothing before the Board that specifically indicates that it has been used this way. The Conveyor Agreement speaks to many different aspects of work on conveyor and monorail installations - the erection of protective screen guards is but a small part of that document. Accordingly, while the materials filed by the Millwrights do establish that the Conveyor Agreement has been applied by some employers in Board Area 5, it is far from clear that it has ever been applied to distribute the work in dispute as between members of the two trades in this proceeding. In fact, if anything, the one thing that is clear is that Canal, along with numerous other employers in Board Area 5, have assigned the work in dispute exclusively to the Ironworkers, or to a composite crew of Ironworkers and Millwrights. Accordingly, it has not been established that the Conveyor Agreement has been applied in Board Area 5 to assign the work in dispute as amongst members of the Millwrights and the Ironworkers.

20. In the circumstances of this case, then, the trade agreement factor does not cause us to conclude that the work in dispute ought to have been assigned to members of the Millwrights.

21. As noted earlier, the other factors taken into account by the Board in determining work assignment disputes are neutral in this proceeding. On the basis of the materials before the Board, the strong evidence of employer practice compels the conclusion that the work in dispute ought to have been performed by members of the Ironworkers.

22. We make one final observation here. During the course of the oral consultation the parties quite vigorously argued the issue of whether the practice of Canal ought to be considered "employer" practice. As was noted by the Board at the time, if we had concluded otherwise - that is, that Canal's practice in assigning the work in dispute ought not to be considered to be "employer" practice - the practice of Canal in Board Area 5 would establish an overwhelming area practice in favour of the Ironworkers. Such an overwhelming area practice would have caused us to reach the same conclusion as we have reached otherwise.

23. Accordingly, this application is granted, and the Board declares that the work in dispute ought to have been assigned to members of the Ironworkers.

3878-96-R; 3879-96-G International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 721, Applicant v. Peel Steel Ltd., Peel Steel (Northern) Limited and **Tower Steel Company Ltd.**, Responding Parties; International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721, Applicant v. Tower Steel Company Ltd., Responding Party

Construction Industry - Construction Industry Grievance - Practice and Procedure - Related Employer - Sale of a Business - Union asking Board to direct employer to produce certain documents prior to hearing of application, including list of clients and suppliers - Board making order, but imposing certain conditions - Board directing that no copies of list be made, that list be returned upon completion of proceedings, and that individuals and businesses named on list be contacted by union only through its counsel

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD; April 27, 1998

1. These proceedings are, respectively, an application brought pursuant to sections 69 and 1(4) of the *Labour Relations Act, 1995* (hereinafter "the Act"), and an application brought before the Board pursuant to section 133 of the Act. The proceedings are scheduled for hearing on July 7, 8 and 9, 1998.

2. The applicant (hereinafter "Local 721") has written requesting that the Board require the responding party Tower Steel Company Ltd. (hereinafter "Tower") to produce certain particulars and documents in advance of the hearing. It is evident that Tower has provided, to date, a number of the documents requested by the applicant. However, there remains in issue the question of the production of a list of clients and suppliers of Tower, which that entity has refused to provide to Local 721. It is evident that counsel have made good faith efforts to resolve the issue short of a Board order. However, no resolution has been reached by the parties. Accordingly, Local 721 has requested that the Board direct the production of that information. Further to that request, the parties have now filed their submissions on the issue with the Board.

3. I do not propose to describe, at great length, the respective theories of the parties' cases. In essence, Local 721 asserts that the principal of the predecessor employer(s) carries on business as

Tower, and that the information requested is relevant to that issue, as well as to the question of actual or potential erosion of bargaining rights, and therefore the exercise of the Board's discretion to make a related employer declaration. Tower, on the other hand, asserts that Local 721's application is unfounded, on the basis that the predecessor business was sold to a third party, which is currently bound to a collective agreement with Local 721.

4. It is my view that the information requested by Local 721 is arguably relevant to the application before the Board under sections 69 and 1(4) of the Act. It may well be that obtaining the information requested may not - in and of itself - produce all of the answers sought by Local 721, as was suggested by counsel for Tower. However, the information will enable Local 721 to prepare its case in advance of the hearing. This, of course, is the primary reason that the Board utilizes its pre-hearing production powers (see, in particular, sections 111(2) and 69(8) of the Act) to require responding parties to produce documentation and information in advance of the hearing. In accordance with sections 69(8), 111(2)(a) and (b) of the Act, I order Tower to produce to Local 721 a list of its clients and suppliers.

5. Counsel for Tower submitted, in the alternative, that should the Board order production of the list of clients and suppliers as requested by counsel for Local 721, certain restrictions ought to be imposed on the order. Most importantly, counsel requested that Local 721 and its counsel be restricted from contacting the businesses and individuals named on the lists for any purpose without the express permission of Tower. Other restrictions related to the return of the lists after their review and the requirement that the lists not be disclosed or used for any other purpose than these proceedings.

6. In the circumstances, I am of the view that it is appropriate to place some limitations upon the use of the list produced by Tower. However, for reasons which are almost too obvious, it is inappropriate to restrict Local 721 from contacting the businesses and individuals named on the lists without the express permission of Tower. Accordingly, I direct the following:

- (a) Tower is to provide to Local 721 a list of its clients and suppliers, forthwith;
- (b) the list produced by Tower is to be used strictly and only for the purpose of these proceedings and not for any other collateral or ulterior purpose. I note here that the Board has, previously, refused to allow a party to rely upon a document that had been improperly utilized in breach of such an obligation (see *Bridgewood Plumbing Limited*, Board File 004-95-R, unreported decision dated October 24, 1995);
- (c) no copies of the list produced by Tower is to be produced by Local 721 or its agents, without the consent of Tower. Upon the completion of these proceedings, Local 721 is to immediately return to Tower the list previously produced, and any copies created in accordance with this order; and
- (d) the businesses and individuals named on the list are only to be contacted by Local 721 through its counsel, unless the Board specifically orders otherwise.

In my view, the imposition of these restrictions protects the interests of both Local 721 and Tower.

7. This panel is not seized of this proceeding.

1704-97-JD Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America, Applicant v. Labourers' International Union of North America, Local 183, Labourers' International Union of North America, Local 837, Labourers' International Union of North America, Local 506, Labourers' International Union of North America, Ontario Provincial District Council, **Well-Bur Construction Ltd.**, and Granville Constructors Ltd., Responding Parties

Construction Industry - Evidence - Jurisdictional Dispute - Natural Justice - Carpenters' union seeking reconsideration of decision in jurisdictional dispute complaint on grounds that Board departed from previous Board policy and that Board made findings of fact without an evidentiary base - Reconsideration request dismissed

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. Knight* and *G. McMenemy*.

DECISION OF THE BOARD; April 24, 1998

1. This is an application concerning a work assignment which was filed with the Board pursuant to section 99 of the *Labour Relations Act, 1995* (hereinafter "the Act"). On February 9, 1998, this panel of the Board confirmed the assignment of the work made by Well-Bur Construction Ltd. (hereinafter "Well-Bur"). The applicant (hereinafter "Local 27") has requested that the Board reconsider its decision. The parties to this proceeding have all made submissions regarding Local 27's request, and Local 27 has now responded to their submissions.

2. Section 114(1) of the Act provides the Board with the discretion to reconsider any decision it has made. That provision of the Act reads as follows:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

3. The Board's policy regarding reconsideration has been clearly enunciated in its jurisprudence, including *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096, and *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185. As a general proposition, the Board will not reconsider a decision unless a party intends to introduce new relevant evidence which could not have been previously obtained by the use of reasonable diligence, and where such evidence, if adduced, would be practically conclusive of the case. Alternatively, the Board may reconsider its previous decision if a party intends to raise objections or make representations which were not already considered by the Board and which the party had no prior opportunity to raise. As well, the Board will exercise its authority to reconsider a decision if an obvious error is identified, or if important policy issues are raised which have not received adequate attention (see, for example, *Ontario Hydro*, [1993] OLRB Rep. May 442). The rationale for the narrow limits imposed on the exercise of the Board's power to reconsider its earlier decisions is obvious - only if Board decisions are considered to be final can they be relied upon by the parties as establishing the rights as between them.

4. Some background about what this proceeding was all about is helpful. In May, 1991, four trade unions entered into an agreement with respect to work jurisdiction. Local 27 and Labourers' International Union of North America, Local 183 (hereinafter "Local 183") were two of the unions signatory to the agreement, known colloquially (and, it would appear, somewhat optimistically) as "the

Peace Treaty". For the purposes of this proceeding, the important aspect of the Peace Treaty is that it provides that "the carpentry portion of concrete forming construction work" on most projects in the ICI sector of the construction industry is to be performed exclusively by members of Local 27 employed under the Carpenters' Provincial ICI agreement.

5. In April, 1996, Granville Constructors Ltd. was awarded an upgrade project at the Barrie Water Pollution Control Centre, a project that Local 27 asserts was one in the ICI sector of the construction industry. The concrete forming work was subcontracted to Well-Bur. Local 27, upon learning of the project, became of the belief that members of Local 183 had been assigned "the carpentry portion of the concrete forming work" on the project, in violation of the Peace Treaty. Accordingly, it invoked a provision of the Peace Treaty which permits for the arbitration of disputes under that agreement.

6. Prior to arriving at arbitration, Local 183 satisfied Local 27 that none of its members had been on site at the Barrie project. It became clear that members of Labourers' International Union of North America Locals 506 and 837 (hereinafter "Local 506" and "Local 837" respectively) had performed the work in question. As a result of learning that information, the arbitration under the Peace Treaty was adjourned, and this proceeding was filed at the Board. In essence, Local 27 asserted that its members ought to have been assigned the work in dispute at the Barrie project, and that the arrangement between what it described as "the Labourers' Union" and Well-Bur was contrary to section 162 of the Act.

7. A consultation was held at the Board on December 5, 1997. At the conclusion of the consultation, the Board reserved its decision. As noted above, the Board's decision issued on February 9, 1998, and confirmed the work assignment made by Well-Bur.

8. The reconsideration request filed by Local 27 contains two separate grounds for the Board's reconsideration of its decision. First, it is submitted that this panel of the Board departed from previous Board policy with respect to the approach to be taken to matters which are alleged to be both a violation of the Act and a jurisdictional dispute. Secondly, it is submitted that certain facts determined by the Board which underlie our decision were determined without an evidentiary base, and that this panel has, therefore, denied natural justice to Local 27.

9. Turning to the first ground, it is evident to us that the concerns raised by Local 27 stem from an erroneous interpretation of paragraph 12 of our February 9, 1998 decision. In that paragraph, we stated the following:

Turning next to the criterion of trade agreements, counsel for Local 27 relied upon the Peace Treaty referred to above as a document of significance. The difficulty with Local 27's position is the simple fact that neither Local 506 nor Local 837 is a signatory to or bound by that document. To the extent that it is asserted that Local 183 has caused the work in dispute to be assigned to sister locals to avoid the provisions of the Peace Treaty, a jurisdictional dispute proceeding is not the proper forum for determination of that question. In the result, there is no relevant trade agreement which speaks to the work in dispute.

Counsel for Local 27, in his submissions in support of the reconsideration request, cites the Board decision of *Peter Kiewit Sons Co. Ltd.*, [1991] OLRB Rep. July 881 for the proposition that issues with respect to the application of bargaining rights, alleged violations of the Act, and competing jurisdictional claims of trade unions ought not to be filed as unfair labour practices, but as jurisdictional disputes. He submits that given the hearing process for unfair labour practice complaints and the consultation process for work assignment disputes - two entirely different processes - it is not possible to combine the two, particularly where the issues in the jurisdictional dispute may be dealt with in the unfair labour practice

proceeding by way of direct evidence. Counsel concludes by urging the Board to confirm the practice of the Board as described by *Peter Kiewit Sons Co. Ltd.*, cited above.

10. It would appear to us that counsel for Local 27 has quite innocently misinterpreted what the Board intended to say at paragraph 12 of our February 9, 1998 decision. In fact, counsel for Locals 506 and 837, in his submissions in response to the applicant's request for reconsideration, has quite accurately identified the meaning of our observation at paragraph 12. The comment made in the last half of paragraph 12 was merely our observation that if Local 27 was asserting that Local 183 had purposely caused the work in dispute to be assigned to Locals 506 and 837, it may well be that the initial arbitration process might be the proper forum for consideration of that issue. We never intended to comment on or depart from any Board policy regarding the litigation of unfair labour practice matters in the context of jurisdictional disputes.

11. In the request for reconsideration, counsel for Local 27, after suggesting that the Board's current consultation process is "a vast improvement" on the former practice of lengthy hearings, submits that the consultation process has its limits. It is suggested that, where a matter is central to the Board's decision, the Board ought not to make findings of fact with those factual disputes outstanding. It is then argued that such a scenario occurred in this case, because "the Board concluded that there was no trade agreement on the basis that such issues ought not to be part of a jurisdictional dispute". We disagree. Paragraph 12 of the February 9, 1998 decision was meant to (and in fact does clearly) state that "the Peace Treaty" cannot be considered to be a "trade agreement" so as to affect either Locals 506 or 837. It cannot have that effect vis-a-vis Locals 506 and 837 because they are not signatory to the document. "The Peace Treaty" may well be a "trade agreement" as amongst the signatories to the document. But the work was assigned to members of two trade unions which were not bound by "the Peace Treaty", and therefore the document can have no effect regarding the assignment of work made in this instance. That is why paragraph 12 of our decision refers to the lack of a "relevant" trade agreement. Accordingly, with that clarification, we will not reconsider our previous decision on this ground.

12. The second ground for reconsideration is of greater significance. As noted above, Local 27 raised for consideration an argument based upon section 162 of the Act. The paragraphs of our earlier decision which underlie the reconsideration request are paragraphs 9 and 10, which read as follows:

9. Not surprisingly, opposing counsel viewed the matter quite differently. We do so as well. As was pointed out by counsel for Local 183, the Board has stated, on many occasions, that although the Labourers' International Union of North America or one of its affiliated local unions cannot represent carpenters and carpenters' apprentices in the ICI sector of the construction industry, any one of those entities can represent "construction labourers performing carpentry work" in that same sector of the construction industry (see, for example, *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305, at para. 22 and 23; *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254, at para. 30; and *Ellis-Don Limited* (Board File 1754-95-JD, unreported decision dated July 18, 1996)). In the latter decision, the Board made the following observations:

48. Both carpenters and labourers perform the work that is the subject of the jurisdictional dispute. The fact that a labourer performs work also performed by a carpenter does not make the labourer a carpenter or vice-versa. The fact that the Labourers inserted the word "carpenter" front of the form-builder classification does not make a construction labourer into a carpenter or change the scope clause to include carpenters.

49. Because the Labourers' or any other trade union performs work that is also performed by another trade union as part of its recognized work it does not extend bargaining rights for this other trade or craft. As the Board has said in *Ellis-Don Limited*, supra, and *Gisar Contracting Limited*, supra, the use of the term "formsetter" or "form-builder" does not create a "carpenter" or a "labourer". Adding the word "carpenter" in front of the

classification of “formsetter” or “form-builder” cannot expand the scope of all construction labourers of the collective agreement to include all carpenters. On that basis any parties to a collective agreement could negotiate various classifications within the overlap area of certain trades and claim bargaining rights for other trades or crafts

10. We agree. The work in dispute in this proceeding is not particularized, but it cannot be disputed that what can be described as “the carpentry portion of concrete forming work” in the ICI sector of the construction industry has been performed, historically, by both labourers and carpenters. This does not lead to the conclusion, however, that section 162 of the Act has been violated. Neither Local 506, 837 or 183 purports to represent carpenters and carpenters’ apprentices in the ICI sector of the construction industry, but rather construction labourers (or “formworkers”) in that same sector. Representation of the latter group by Locals 506, 837, and 183 is entirely within the scope of section 162 of the Act. The fact that “construction labourers” perform work that “carpenters and carpenters’ apprentices also perform cannot lead to the conclusion that section 162 of the Act has been violated.

13. Local 27’s concerns regarding these paragraphs are raised in the context of an objection regarding the relevance of certain submissions made in the materials before the Board, and during the course of the consultation. At the outset of the hearing, counsel for Local 183 asked that the Board strike certain references in paragraphs 2, 6 and 29 of the applicant’s consultation brief relating to alleged violations of “the Peace Treaty”. After hearing the submissions of counsel for Local 27, we ruled that we were not satisfied that certain allegations of misconduct relied upon by Local 27 had been properly pleaded. Furthermore, we were of the view that the conclusions that Local 27 desired the Board to reach with respect to the conduct of Locals 183, 506 and 837 (and their agents) were not necessary to resolve the work assignment dispute before the Board. We did indicate, however, that reference to “the Peace Treaty” and its provisions may be of some relevance. We therefore struck the references in paragraphs 2, 6 and 29 of Local 27’s brief which asserted that there had been a circumvention of “the Peace Treaty” by Locals 183, 506 and 837.

14. Later, during the course of the consultation, counsel for Local 27 asserts that, while in the midst of argument, counsel for Well-Bur and Granville successfully objected to his submissions and he was unable to complete his remarks regarding the two different “types” of collective agreements to which the various locals of the Labourers’ International Union are bound. Counsel for Well-Bur and Granville, in response, takes the position that counsel for Local 27 was not so precluded, and that his notes indicate that the Board responded to his objection by permitting counsel to continue. Having reviewed our notes, we concur with the position of counsel for Well-Bur and Granville - our notes reflect only that an objection was made; not that the objection was granted. It is also evident from our notes that counsel for Local 27 made thorough and complete representations regarding the Form Work Council agreement and the Labourers’ Provincial ICI agreement.

15. Why is all of this important? Counsel for Local 27 asserts that paragraphs 9 and 10 above reflect a finding of fact about the bargaining unit and the scope of the collective agreement on which there was no evidence. Counsel asserts that the Labourers’ collective agreements fall into two types, as described in a series of earlier Board decisions. One covers construction labourers (such as the MTABA or THLB agreement); another is the agreement between the Form Work Association and the Form Work Council. Counsel claims that our analysis was insufficient, and that we did not have the proper information before us to reach a conclusion in this case - that “it is inappropriate to conclude that [the collective agreement] covers only construction labourers who perform carpentry work, or conversely that it is a bargaining unit covering carpenters and carpenters’ apprentices even if not so named”.

16. In essence, then, counsel for Local 27 asserts that he was attempting to demonstrate to the Board that this was, in fact, a bargaining unit which included carpenters, notwithstanding an attempt to “paste” the label of the Labourers’ Provincial ICI agreement over it, and that he was precluded from

doing so during the course of the consultation. His penultimate paragraph in the reconsideration request reads as follows:

24. Accordingly, we were unable to complete our submissions on the basis of the documents filed as to which of the two “types” of agreements this was or to suggest what other evidence was necessary to determine this question. Frankly, a conclusion that five very similar projects performed by the same core group of persons from Hamilton Local 837 supplemented by Labourers from the local Labourers’ Union under the Formwork Council Agreement should be enough to shift the burden of persuasion to the parties wishing to maintain the label of the Provincial Collective Agreement. Other relevant evidence would include the detailed nature of the work performed on the previous projects, a determination that the Formwork Council Agreement was utilized, and the distribution of personnel on those projects was [sic] compared to the instant one.

17. With all due respect to counsel for Local 27, we most vigorously disagree with the submissions he has made in support of his client’s reconsideration request. It is clearly evident from our notes that counsel for Local 27 was given every opportunity to make submissions regarding the section 162 issue and the question of the applicability of the various collective agreements under which the work in dispute may have been performed. The underlying rationale for dealing with these two issues was noted during the course of argument by counsel himself - “collective bargaining relationships” is a factor taken into account by the Board in determining the appropriateness of work assignments by employers. Local 27 conceded that it had no bargaining relationship with Well-Bur that governed the work in dispute. Counsel urged the Board, through his analysis of the two different agreements at play here (i.e. the Labourers’ Provincial ICI agreement and the Formwork Council Agreement), that there was no relevant collective agreement here binding Well-Bur to the “Labourers’ union”.

18. The other parties to the consultation conceded that the work in dispute was performed under the Labourers’ Provincial ICI agreement, and not the Formwork Council Agreement. This was noted in paragraph 8 of our decision. In fact, at paragraph 33 of the applicant’s consultation brief, it is stated that “The Labourers’ Provincial Collective Agreement ... was the collective agreement employed on the project”. We were not satisfied that Local 27 had established otherwise during the course of the consultation.

19. More importantly, we are not satisfied that, at this late date, Local 27 ought to be provided with a further opportunity to establish that which it asserts it was precluded from doing during the course of the consultation. As noted above, we are entirely satisfied, having reviewed our notes of the consultation, that counsel for Local 27 was provided with a full opportunity to make any submissions he desired on the issue. In fact, we are quite confident that he did. It appears to us that what Local 27 really wants to do, at this time, is to turn back the clock, as it were, and re-argue the point (having been previously unsuccessful) with the aid of *viva voce* evidence on the matter - in particular, that referred to in paragraph 24 of his client’s reconsideration request, outlined above. As noted in *Ontario Hydro*, cited above, a request for reconsideration is not intended to provide a second opportunity for a party to make its case. We note here that at no time during the course of the consultation did counsel for Local 27 submit that there was any need to call *viva voce* evidence; nor did Local 27 submit any written materials speaking to the “detailed nature of the work performed on the previous projects, a determination that the Formwork Council Agreement was utilized, and the distribution of personnel on those projects” as compared to the one before the panel of the Board.

20. We make all of the above observations, in one sense, on a “without prejudice” basis, because we are of the view that the nature of a consultation is entirely different than a hearing. In fact, a review of the submissions made by Local 27 would seem to suggest that the difference between a consultation and a hearing is acknowledged and appreciated.

21. Prior to the advent of the immediate predecessor of the current consultation process, work assignment disputes were resolved by hearings in the traditional sense - which counsel for Local 27 refers to as "twenty day marathons". He further notes that "by requiring a consultation brief containing all alleged facts and all arguments, the entire process is made simpler. It requires parties to articulate facts and arguments on which they rely prior to the hearing". That this is now the method utilized by the Board to resolve jurisdictional disputes is well-known.

22. It is evident from the Board's Rules of Procedure, particularly Rules 72 to 75, that the parties to a work assignment dispute are expected to file with the Board a brief containing a statement of all of the issues in dispute, and the facts upon which they intend to rely. These same documents are to be delivered to all of the other parties. Furthermore, and most importantly, section 99(3) of the Act makes it quite clear that it is unnecessary, for the purpose of work assignment disputes, to hold a hearing. Instead, as is directed by section 99(5) of the Act, the Board can make an order regarding a jurisdictional dispute after consulting with the parties.

23. In our view, the concept of "consulting" with the parties incorporates a great deal of latitude for the Board. Rule 76 of the Board's Rules of Procedure makes it quite clear that, where the Board is satisfied that a proceeding can be decided on the basis of the material before it, the proceeding can be determined "without an oral hearing". In those circumstances it is also unnecessary for the Board to convene the parties to entertain oral submissions on the conclusions that the Board ought to reach. Accordingly, the parties must be prepared, in all such cases, to have made their case in the materials filed with the Board.

24. In *Ontario Hydro*, cited above, the Board made the following observations about the consultation process, at paragraph 10:

In this case, the Board found it appropriate to schedule a consultation, a proceeding which is something less than a hearing in the traditional sense. Nevertheless, a consultation is an opportunity, perhaps the only opportunity, for the parties to a jurisdictional dispute complaint to address the Board with respect to the matter. The rules of natural justice do not apply to such a proceeding in any traditional sense. However, the parties are afforded the opportunity to refer to the extensive materials which they are required to file in such cases, and to make representations with respect to how the Board should proceed (including whether the Board should hear evidence or otherwise hold a hearing on any matter or issue) or dispose of the complaint.

25. Here, too, the Board found it appropriate to schedule a consultation with the parties, to entertain their oral submissions on the materials filed with the Board. Although it would have been open to the Board to determine selectively the issues upon which we would have entertained submissions, instead the Board permitted counsel the opportunity to comment on all of the materials filed (subject to the objection which was allowed, noted above). In that context, and keeping in mind that the Board need not have scheduled an oral consultation in the first place, we find it difficult to understand how it can be said on the facts before us that Local 27 could in some way have been denied natural justice on December 5, 1997. However, even so, we repeat here that at no time on December 5, 1997 did counsel for Local 27 suggest during the course of the consultation that it was necessary to call oral evidence, or to hold a hearing to deal with any of the evidence which he now desires to call. It is too late, at this juncture, to do so.

26. In our view, Local 27 has not established any grounds for reconsidering our decision. There has been no breach of natural justice which would warrant a reconsideration of our prior decision. The traditional Board test for reconsideration has not been satisfied. In the circumstances, then, we reject this reconsideration request.

3404-97-G International Union of Operating Engineers, 793, Applicant v. Williams Contracting Limited, Responding Party

Construction Industry - Construction Industry Grievance - Evidence - Natural Justice - Reconsideration - Employer neither replying to union grievance referrals, nor attending officer meeting or Board hearing - Board upholding grievance and ordering damages - Employer seeking reconsideration of Board decision on ground that union's referral failed to set out all material facts relied upon or extent of damages claimed and because Board relied entirely on hearsay evidence in upholding grievance - Reconsideration application dismissed

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD; March 10, 1998**I. Introduction**

1. This is a construction industry grievance brought before the Board for arbitration pursuant to section 133 of the *Labour Relations Act, 1995* (hereinafter "the Act"). By way of decision dated January 7, 1998, this application was granted and the Board awarded various forms of relief. Counsel for the responding party has now requested that the Board reconsider its decision. Counsel for the applicant has filed written submissions with the Board in response to that request.

2. Some background information is necessary to put this request in context. The application, in fact, supports three separate grievances filed by the applicant (hereinafter "Local 793" or "the union") with the responding party (hereinafter "Williams Contracting" or "the employer") dated September 15, 23 and (apparently) 30, 1997. The three grievances are, in all material respects, identical, and allege that Williams Contracting has, at various sites, violated the entire Operators' Provincial Collective Agreement (hereinafter "the collective agreement") from 1995 by failing to pay the appropriate wages, overtime and travel time prescribed by the collective agreement. The grievances further claim that Williams Contracting failed to remit the union dues, training and labour relations fund remittances, pension and benefit remittances, and other contributions required by the collective agreement. The grievances are broadly worded and the specifics of the claims made by the union do not appear on their face.

3. The grievance referral (Form A-69) filed with the Board by Local 793 does not elaborate on the substance of the grievances. It does, however, identify with some particularity the remedies requested by Local 793. In particular, the grievance referral claims for:

- (a) declarations that Williams Contracting is bound by the terms of the collective agreement, and that it violated the terms of that agreement;
- (b) damages "in an amount to be proven representing any and all unpaid wages, remittances, deductions, allowances and contributions for any and all hours worked by members of the Applicant in the employ of the Responding Party";
- (c) liquidated damages on the above amount in accordance with Article 24.4 of the collective agreement;
- (d) reasonable costs in accordance with Article 24.6 of the collective agreement;

- (e) an order requiring Williams Contracting to post or secure an unconditional letter of credit or other form of security acceptable to Local 793 in the amount of \$20,000 in accordance with Article 24.6(v) of the collective agreement; and
- (f) interest on any and all damages awarded by the Board.

There is no dispute that the grievance referral filed with the Board by Local 793 was served upon Williams Contracting well in advance of the hearing of this proceeding.

4. On December 11, 1997, Local 793 filed the grievance referral with the Board. The grievance referral was processed by the Board in due course. In accordance with section 133(2) of the Act, the Registrar of the Board set a hearing date of January 6, 1998. A Notice of Hearing which set out the hearing date was forwarded to the parties on December 16, 1997. That notice indicates that the Registrar had set January 5, 1998 as the terminal date - that is, the date by which Williams Contracting was required to file its response. Accordingly, shortly after December 16, 1997, the parties were aware of when pleadings were required to be filed, and when the proceeding would be heard by a panel of the Board on its merits.

5. On December 17, 1997, the Labour Relations Officer assigned to meet with the parties to attempt resolution of the outstanding issues wrote to the parties and advised that he would convene a pre-hearing meeting in order to attempt settlement on December 30, 1997. The Officer's letter noted that the hearing of the proceeding on its merits was scheduled for January 6, 1998.

6. By way of letter dated December 23, 1997, telefaxed to the Board, Ms. Alice Kutynec (who would appear to be related to the principal of Williams Contracting, Mr. William Kutynec) wrote to the Board and advised that Mr. Kutynec could not attend at the hearing as he was out of the country. She requested that the Board adjourn both the pre-hearing settlement meeting and the hearing to other dates. She also indicated in this letter that Williams Contracting would not be filing a response by the terminal date. On the same day, the Registrar of the Board wrote to Williams Contracting and advised it that, without the consent of Local 793, an adjournment could only be obtained from the Board by way of a telephone conference prior to the hearing, or by way of addressing the issue at the opening of the hearing. Counsel for Local 793 wrote to Ms. Kutynec on December 29, 1997, confirming that he would not be consenting to the adjournment of either the Officer's settlement meeting or of the hearing on behalf of his client. Nor would his client consent to an extension of time for the filing of a response by Williams Contracting.

7. The Labour Relations Officer's meeting of December 30, 1997 passed without attendance on behalf of Williams Contracting. Counsel for Local 793, who did attend, wrote to Ms. Kutynec on that same day to confirm, once again, that it was the intention of his client to proceed to hearing on January 6, 1998, whether or not anyone attended on behalf of the employer. It would appear that this correspondence was facsimiled to Williams Contracting on December 30, 1997. A copy of the letter was forwarded by applicant's counsel to the Registrar of the Board.

8. The responding party did not file a response to the applicant's grievance referral as required by the Board's Rules of Procedure. Nor did the responding party request of the Board that a telephone conference be convened to deal with an adjournment request, an option which was noted in the correspondence from the Registrar which was sent to the responding party on December 23, 1997.

9. On the day set for the hearing, no one attended at the Board on behalf of Williams Contracting at 9:30 a.m., the time set for the commencement of the hearing. In order to ensure that Williams Contracting had not been delayed for reasons beyond its control, I waited until 10:00 a.m.

before commencing the hearing. The Board received no communication from the responding party on the date of the hearing to the effect that it had been delayed from attending for reasons beyond its control.

10. Once the arbitration hearing commenced, I heard the sworn evidence of Ms. Daveen Lidstone, the Delinquency Control Officer for Local 793. Having regard to her evidence, and the materials filed with the Board (which I will elaborate upon below), I made certain findings of fact and awarded damages and other relief to Local 793 in accordance with its request contained in the grievance referral to the Board. It is this relief that Williams Contracting desires to have reconsidered.

II. The Basis for Reconsideration

11. The reconsideration request filed by the employer sets out the following grounds for reconsideration:

- (a) Williams Contracting did not understand from the application, because it is not disclosed on its face, that the liability of the employer was significant. It is asserted that the employer understood that “relatively minor amounts” might be owed as a result of “mistakes or inadvertence” on the employer’s part. It is further submitted that the employer acted reasonably in this regard because of the lack of particularity provided by the union in the application;
- (b) the application did not comply with the Board’s Rules of Procedure nor the requirement of section 8 of Form A-69 (the grievance referral) that the material facts relied upon be pleaded. It is specifically noted that the application does not identify the employees affected, the date that alleged violations of the collective agreement occurred, and the amounts claimed on behalf of individual employees. Accordingly, it is argued that the Board permitted the union to expand on the grievances without notice to the employer;
- (c) the Board denied the employer natural justice because the matter heard by the Board was significantly different than was disclosed by the application; and
- (d) the Board in its decision relied entirely upon hearsay evidence provided by Ms. Lidstone, rather than that of employees claimed to have been affected by the alleged violations of the collective agreement. Further, the Board’s decision does not indicate which employees were considered in establishing the quantum of damages set out in the decision, and, due to the amount of damages ordered, must include sums relating to persons not employed in the bargaining unit, or reflect exaggerated amounts for those who were employed in the bargaining unit. It is submitted that those claims would have been rebutted by the employer had it been given notice of the details of the claims in accordance with the Board’s Rules of Procedure.

I will deal with each of these grounds below. However, before doing so, it is appropriate to briefly review the Board’s longstanding approach to the exercise of its power to reconsider its decisions.

III. The Exercise of the Board’s Authority to Reconsider its Decisions

12. Section 114(1) of the Act, which provides the Board with the authority to reconsider its decisions, states as follows:

- 114(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

13. The Board's general approach to the reconsideration of its decisions has been clearly enunciated in cases such as *John Maggio Excavating Limited*, [1994] OLRB Rep. Jan. 31, where the Board made the following observations:

As a general proposition, the Board will not reconsider a decision unless a party intends to introduce new relevant evidence which could not have been previously obtained by the use of reasonable diligence, and where such evidence, if adduced, would be practically conclusive of the case. Alternatively, the Board may reconsider its previous decision if a party intends to raise objections or make representations which were not already considered by the Board and which the party had no prior opportunity to raise. The rationale for the narrow limits imposed on the exercise of the Board's power to reconsider its earlier decisions is obvious - only if Board decisions are considered to be final can they be relied upon as establishing the rights as between the parties.

14. This general rule is not one which is "cast in stone". However, for the reasons identified immediately above, it will be observed by the Board in most cases. One concept which is central to the exercise of the Board's reconsideration power is that of "reasonable diligence". The evidence desired to be introduced by the party seeking reconsideration must be evidence which could not have been previously obtained by the use of reasonable diligence. Furthermore, objections or representations to be raised can only be raised if the Board has not previously considered the objection or representation and the party had no prior opportunity to raise it.

15. With these principles in mind, I will consider the merits of the request for reconsideration made by the employer.

IV. Decision

16. At the core of the employer's request for reconsideration is an assertion that the applicant failed to particularize the claims it was making so as to put the responding party on notice of the size and nature of the violations of the collective agreement alleged by the union. If it had known of the size and nature of these claims, the employer asserts that it would not have believed that the amounts in dispute were minor rather than substantial, and would have introduced evidence in response to the assertions to prove that the allegations were unsupported or substantially exaggerated.

17. There can be no doubt that the grievances filed in this proceeding, and the grievance referral filed with the Board, are drafted in a very broad manner. Normally, such general pleadings would cause the Board some concern. However, when considering the appropriateness of such a broad pleading, one must keep at the forefront of one's mind the nature of the proceeding. It is a referral, to the Board, of three collection grievances in the construction industry. Quite often (though not always), the union will know very little about the actual details of the violations of the collective agreement that it alleges. As a practical matter, all that the union will be aware of in certain cases is that a particular employer is performing work which appears to be covered by the collective agreement, and that that same work is not being reflected by referrals from its hiring hall, or remittances which are (or are not) being forwarded to the union or its agents by the contractor on a monthly basis. Accordingly, the Board quite often receives from trade unions arbitration referrals of a broadly-worded nature. The trade unions typically assert that an employer bound to a collective agreement has not abided by the full terms of the agreement. However, the specific details of that violation are not always in the possession of the trade union at the time of filing.

18. The Board's practice in construction grievance referrals is to appoint a Labour Relations Officer to meet with the parties prior to the hearing to discuss settlement of the claim. These pre-hearing meetings are important because they facilitate not only the settlement of all or part of the dispute, but also the exchange of information between the parties. The importance of these meetings is highlighted by the Registrar in the Notice of Hearing which is forwarded to the parties upon the filing

of the grievance referral with the Board. On the face of the Notice of Hearing, it is stated, in bold face type, that “the parties are expected to meet with the Officer before the hearing”. It is at this meeting that the union and the employer discuss the underlying factual dispute and obtain information about the other’s case. A large number of these construction grievances are settled (or are, at the very least, primed for settlement) during the course of these meetings.

19. The responding party did not attend at the pre-hearing meeting with the Officer in this case. It purposely chose to not appear at that time. Accordingly, Williams Contracting failed to take advantage of that opportunity to sit down with the union and discuss the specifics of the claims being made. I should note here that the testimony before me at the hearing of the merits of this proceeding disclosed that one or more of three representatives of the union (Messrs. Monti, Hillis and Ms. Lidstone) met with the employer on five separate occasions to discuss the particulars of the grievances before the union filed the grievance referral with the Board. Accordingly, it would appear that there were a number of opportunities for the responding party to obtain information from the union regarding the merits of the claim. However, even if I were to ignore those meetings, the fact is that the employer consciously chose to not attend at the Board’s pre-hearing settlement meeting, and willingly passed upon its best opportunity to obtain the specific facts relied on by the applicant.

20. In that context, the facts and arguments relied upon by the employer to ground its request for reconsideration are not particularly persuasive. If Williams Contracting was under the impression that the sums of money in question were “relatively minor amounts” which were the result of “mistakes or inadvertence” on its part, then surely that impression would have been altered had the employer attended at the meeting of the Labour Relations Officer on December 30, 1997, and confirmed the full extent of the potential liability it faced. But it chose to neither attend nor to seek an adjournment of that meeting. Accordingly, any continued misunderstanding relating to the scope of its liability is hardly “reasonable”, keeping in mind that it had an early, effective opportunity to discover exactly what the union claimed was due to it.

21. On a similar note, I agree with the observation made by counsel for the employer that the application did not comply with the Board’s Rules of Procedure (reflected by section 8 of the Form A-69) which requires the applicant to plead all of the material facts relied upon in support of its claim. However, as noted above, in construction industry collection grievances the Board does not expect an applicant to be aware of all of the facts relied upon in support of its claim at the time that the grievance referral is filed with the Board. In fact, many collection grievances are accompanied by requests for pre-hearing production orders (typically ordered by the Board after the parties have met with the Labour Relations Officer assigned to the file) or are supported by the service of a subpoena *duces tecum*. In cases such as these, the Board will usually relieve against the strict application of its Rules (as is permitted by Rule 21 of the Board’s Rules of Procedure) in order to ensure that the application is dealt with on its merits. In the circumstances of this case, I would have been quite prepared to do just that.

22. I disagree with the employer’s submission that to allow the union to rely upon details raised at the hearing has the effect of “expand[ing] on the grievance without notice” to the employer. As noted above, the union pleaded its claim in the broadest of terms. The responding party ought to have been aware that the claim made by the union raised questions relating to the application of the collective agreement to numerous sites and individuals. That is, without any limiting language, all of the employer’s sites, since 1995, were “on the table”. For the reasons outlined above, the employer ought to have attempted, prior to the hearing, to “narrow down” the scope of the grievance. If the union did not identify in greater particularity the facts relied upon, the employer could have quite legitimately requested particulars of the claim before or at the outset of the hearing, as responding parties to these proceedings often do. Collections grievances are not to be treated as “fishing expeditions”; if not properly pleaded at the outset, an applicant will be required to particularize its allegations prior to

litigation on the merits (see, for example, *Andrew Paving & Engineering Ltd.*, Board File 3729-97-G, unreported decision dated February 2, 1998). Here, though, the employer failed to attend at either the pre-hearing meeting with the Officer or at the hearing, and neglected to use either of these opportunities to obtain particulars.

23. For these same reasons, I disagree that the employer was denied natural justice because the matter heard by the Board was “significantly different” from that pleaded. The matter that was heard by the Board was the same matter that was filed with the Board, and the full particulars relied upon could easily have been obtained by the employer at various points in the process. The employer simply chose to not attend the meeting with the Officer, and to not attend at the hearing itself. Nor did it request that an adjournment be provided by the Board. In this respect, there is no doubt that the union was unwilling to consent to an adjournment of the proceeding. However, the option of a telephone conference to deal with an adjournment, or raising the issue with the panel at the hearing of the merits, was brought to the employer’s attention quite early on in the process. Once again, the employer chose not to make use of an option available to it. It did not ask for a telephone conference to deal with its adjournment request. It did not attend the hearing to deal with the need for an adjournment. There can be no doubt that the employer was not denied natural justice in any way in these circumstances.

24. In further support of its reconsideration request, the employer relies upon the fact that the evidence heard by the Board was adduced through Ms. Lidstone, rather than through the individual employees affected by the employer’s violations of the collective agreement. Once again, I am of the view that there is no legitimate ground for reconsideration disclosed in the circumstances.

25. The section of the Act which grounds the authority of the Board to act as an arbitration board for grievances in the construction industry is section 133, which reads, in part, as follows:

133(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 48(10) and (12) to (20) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

Section 48(12)(f) of the Act - which applies to the adjudication of grievance referrals by the Board in accordance with the above provision of the Act - provides as follows:

48(12) ...[A]n arbitrator or an arbitration board, as the case may be, has power,

- (f) to accept the oral or written evidence as the arbitrator or the arbitration board, as the case may be, in its discretion considers proper, whether admissible in a court of law or not.

See also section 111(2)(e) of the Act, which provides the Board with the same authority outside of the grievance referral context.

26. In this particular case, I entertained the evidence of the applicant through Ms. Lidstone. There can be no doubt that a majority of her evidence was in the nature of “hearsay” evidence, because it is quite true that the individual union members on whose behalf Local 793 brought this application were not called to testify to their individual circumstances. However, the mere characterization of the evidence as “hearsay” is insufficient to cause me to reject it, in the circumstances of this case. If the employer had requested particulars from the union, and then had challenged the inclusion or exclusion of any particular person or claim on behalf of a person because the facts relied upon by the union were alleged to be inaccurate or untrue, I would have expected the union to produce direct evidence of the claim it was asserting.

27. However, the employer did not make any attempt to defend itself in these proceedings, and it makes little sense to require an applicant to establish, by calling 18 witnesses (15 employees, two business representatives, and Ms. Lidstone), the full claim that it was making in this proceeding. The construction grievance referral provisions of the Act were intended to provide speedy, effective relief for trade unions which allege that contractors bound to collective agreements have violated their provisions. How that legislative purpose could be achieved by requiring the summoning and direct examination of 18 witnesses in a collection matter where the employer fails to attend to rebut the union's evidence is unclear, to say the least.

28. The evidence adduced through Ms. Lidstone included documentary materials supportive of the applicant's claim, in particular pay stubs provided by the employer to the individuals in question. Although these stubs were not provided for each and every individual, for each and every work week claimed by the union, the basis of the amounts claimed is evident from individual summary sheets prepared by Ms. Lidstone. The testimony before the Board was that on the numerous occasions that the union representatives met with the employer, they had the opportunity to review the books and records of Williams Contracting. Ms. Lidstone testified that this review was in the nature of an "audit" by Local 793. The damage calculations prepared by Ms. Lidstone and presented to the Board were based upon the information obtained from Williams Contracting during this "audit" process. In the circumstances, where Williams Contracting determined not to defend itself, and the basis for the damages claimed had, as its genesis, the books and records of the employer, I was satisfied that the evidence presented by Ms. Lidstone was satisfactory to establish the violations of the collective agreement asserted by the applicant, and I awarded damages for unpaid wages, overtime, vacation pay, and pension and other benefits, in the amount claimed by the union.

29. The employer noted, in its request for reconsideration, that the decision of January 7, 1998 did not identify the individuals for whom Local 793 claimed damages. As noted in the January 7, 1998 decision, Local 793 limited its claim for damages to the 1997 calendar year through to September, 1997. The individuals in question, and the amounts claimed on behalf of each representing wages, overtime, and vacation pay, appear directly below:

Barrie, Mike	\$1,470.83
Carrington, George	\$1,642.32
Cody, Malcolm	\$ 39.37
Draper, George	\$ 484.49
Fletcher, Vallis	\$1,731.37
Holmes, Gordon	\$ 527.75
Kutynec, Gary	\$ 957.98
Lewis, George	\$2,843.33
Lewis, Randall	\$ 908.65
McCracken, John	\$ 964.55
Nelson, Gerald	\$1,883.16
Novembre, Louis	\$1,436.98
Pendley, Clayton	\$2,754.60
Suleyman, Boran	\$ 446.19
Teed, Mike	\$ 39.37

The amounts claimed for pension and benefit contributions for the 1997 calendar year, through to September, 1997, are as follows:

January, February and March	\$ 793.04
April	\$ 0.00
May	\$ 530.60
June	\$1,314.29
July	\$2,160.26
August	\$5,634.81
September	\$3,878.42

The total amounts claimed under these two heads of damages are \$18,130.94 and \$14,311.42, respectively, for a total of \$32,442.36.

30. For the reasons identified above, I am not persuaded by the employer's argument that, had it known of the individuals claimed for, it would have concluded that the amounts claimed were exaggerated, and that it would have called evidence to rebut the claim made by Local 793. Ignoring the fact that the union and the employer met, on five separate occasions, and discussed the amounts due and owing (and, by necessary implication, the identity of those who performed the work underlying the claim for damages), the employer ought to have filed a response, attended at the Officer's meeting, and appeared at the hearing and raised these defences. It rings somewhat hollow at this point for the employer to assert that the amounts claimed by Local 793 are exaggerated and would have been rebutted had it known the identities of those underlying the union's claim. If it was in the least bit concerned about the union's grievances, it ought to have done something about it at the appropriate time.

31. I also awarded relief to Local 793 respecting the costs incurred for the preparation and presentation of these grievances, liquidated damages, and for interest accrued on the amounts awarded, all in accordance with specific provisions contained in the collective agreement. Furthermore, for the reasons outlined in the decision of January 7, 1998, I directed that the employer post a bond in the amount of \$20,000 - again, as specifically provided for in the collective agreement. I am satisfied, on the evidence adduced by Ms. Lidstone, that the costs awarded were both reasonable and incurred, and that the interest was quite properly and accurately calculated.

32. Before concluding this decision, it is important to recall once again that the grievance arbitration provisions contained in section 133 of the Act were enacted by the legislature over 20 years ago to ensure that the trade union community had a fast, effective means of enforcing its collective agreements as they related (particularly but not exclusively) to collection matters - that is, allegations that a party bound to a collective agreement has not paid the appropriate rates or abided by all of the monetary obligations in the collective agreement. The construction industry is a very competitive one, and if one contractor is permitted to "avoid" (or even postpone) its obligations under its collective agreement, the effect of that is to permit that contractor a competitive advantage vis-a-vis all other unionized contractors who bid for the same work. This is why contractors and trade unions bound to collective agreements are typically quite content when trade unions enforce their rights under the collective agreements in circumstances such as those before me (see, for a more expansive discussion of this point, the decision of *Kennedy Masonry Company Limited*, Board Files 1842-97-G and 1843-97-G, as yet unreported, dated February 10, 1998) [now reported at [1998] OLRB Rep. Jan./Feb. 50].

33. From the evidence before me, it appears that the employer paid its workforce at the rate of \$20.00 per hour, rather than at the rates contained in the collective agreement which are considerably higher. The applicant quite properly brought this proceeding to the Board in order to remedy that behaviour, and to "even the playing field" amongst those contractors bound to the collective agreement. The employer, until filing this request for reconsideration through its solicitors, did absolutely nothing to suggest that it had any intention whatsoever of defending itself against the allegations made by the union. Nothing raised by counsel for the employer in this request for reconsideration engages the test utilized by the Board for reconsideration, and there are no special circumstances identified which would otherwise lead me to conclude that I ought to reconsider my decision of January 7, 1998.

34. For these reasons, I deny the request for reconsideration.

COURT PROCEEDINGS

2526-89-G (Court File No. C24072) Ellis-Don Limited, Appellant v. The Ontario Labour Relations Board and International Brotherhood of Electrical Workers, Local 894, Respondents

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Employer applying for judicial review on grounds that Board violated principles of natural justice and that decision patently unreasonable - Divisional Court satisfied that decision not patently unreasonable and that there was no basis for speculation that Full Board meeting had been conducted contrary to principles articulated by Supreme Court of Canada in *Consolidated-Bathurst* case - Application for judicial review dismissed by Divisional Court - Appeal dismissed by Court of Appeal

Board decision reported at [1992] OLRB Rep. Feb. 147. Divisional Court decision reported at [1995] OLRB Rep. Dec. 1506.

Court of Appeal for Ontario, Morden A.C.J.O., Weiler and Moldaver JJ.A., April 17, 1998.

The Court (endorsement):

[1] The overall issue on this appeal by Ellis-Don Limited is whether the Divisional Court erred in refusing to hold that there was a reasonable apprehension that a panel of the Ontario Labour Relations Board violated the rules of natural justice. More specifically, the appellant raises two issues:

- (1) Did the Divisional Court err in holding that the question of abandonment of its bargaining rights by Local 353 was a policy issue rather than an issue of fact?
- (2) Did the Divisional Court err in refusing to draw an adverse inference against the board on the basis that the board resisted all attempts to determine what occurred at the full board hearing?

[2] The facts giving rise to this appeal are set forth in the decision of Adams J. on behalf of the Divisional Court, reported at (1995), 89 O.A.C. 45. A further issue dealt with by the Divisional Court, namely whether the ultimate decision of the panel was patently unreasonable, was not the subject of this appeal.

[3] This appeal involves the application of the decision of the Supreme Court of Canada in *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America*, [1990] 1 S.C.R. 282. It is not disputed that:

- (1) following a hearing before a three member panel the board is entitled to meet in full session in the absence of the parties without violating the rules of natural justice;
- (2) law and policy issues may appropriately be discussed by the full board in order to promote consistency;
- (3) the meeting may result in a change in the panel's decision;
- (4) full board meetings may not consider factual issues;
- (5) evidence cannot always be assessed in a final manner by a panel until the appropriate legal test has been chosen.

[4] The appellant submits that the issue whether a union has abandoned its rights is a question of fact and that the change in the panel's decision following the meeting of the full board constitutes proof that the full board interfered in the panel's fact-finding mission. The appellant further submits that in coming to its final conclusion on the issue of abandonment the panel relied not on proven facts but on speculation. We disagree with both of these submissions.

[5] Having raised the issue of a denial of natural justice, the appellant bears the onus of demonstrating that the change in the panel's conclusion on abandonment came about as a result of interference by the full board in the panel's fact-finding process. In our view, that onus has not been met.

[6] A review of the record reveals that the appellant's allegation of full board interference in the fact-finding process amounts to little more than speculation. At most, it is a possible explanation, although by no means the most likely or reasonable one, for the change in the panel's conclusion on the issue of abandonment.

[7] Bearing in mind that when the full board met, it had the benefit of *Consolidated Bathurst, supra*, and having due regard to the presumption of regularity, we are satisfied that the change in the panel's conclusion regarding abandonment came about not as a result of full board interference with the fact-finding process, but rather as a result of a different legal standard which the panel applied to the facts found by them.

[8] The omission of the name of Ellis-Don from Schedule F of the list of contractors in the predecessor union's accreditation application was a fact that gave rise to a number of policy options on the issue of abandonment, as pointed out by Adams J. at para. 31:

The Board had several policy options open to it on the issue of abandonment: (i) the absence of Ellis-Don on Schedule F constituted *per se* evidence of bargaining rights abandonment; (ii) the omission gave rise to a rebuttable presumption of abandonment, thus requiring an explanation from Local 353; (iii) the omission was a factor to be considered along with all the other evidence before the Board; or, finally, (iv) the failure of Local 353 to place Ellis-Don's name on Schedule F was irrelevant, in the circumstances, to the issue of abandonment. Ultimately, the Board concluded the failure of Local 353 to include Ellis-Don on Schedule F was a factor to be considered and was not determinative in the circumstances.

[9] In the draft reasons of the panel, it is apparent that the legal standard applied was one which treated the unexplained omission of the union's name from Schedule F as being presumptive of the union's abandonment of its rights. In the final decision, the panel treated the fact of the omission as one of several circumstances to be considered. The redefinition of the applicable legal standard was a policy decision.

[10] With respect to the submission that the panel engaged in speculation respecting facts which were not in evidence, the record does not bear this out. The fact of the omission, that the employer association involved in the application represented special electrical contractors, not general contractors, that Ellis-Don is a general contractor who had signed the provincial working agreement, that other general contractors who had signed the agreement were also omitted from Schedule F, that Ellis-Don obtained the benefit of the agreement and that it had used only unionized electrical contractors until the grievance rise to this dispute, were all in evidence and were not speculation.

[11] We are also of the opinion that the Divisional Court was correct in refusing to draw an adverse inference against the board. The board did not disclose the internal deliberations which took place at the full board meeting. The Divisional Court ruled, in its interlocutory decision, that Ellis-Don was not entitled to examine board members regarding the internal deliberations at the full board meeting; see (1994), 16 O.R. (3d) 698 (Div.Ct.). On June 13, 1994, the Court of Appeal dismissed Ellis-Don's motion for leave to appeal and leave to appeal was dismissed by the Supreme Court of Canada January 12, 1995. The Divisional Court's decision was based on statutory and common law privileges afforded to the decision-making processes of the board. A presumption of regularity applies. There is no evidence that the procedure at the full board meeting in question departed from the board's usual practice, whereby discussion is limited to the policy implications of a draft decision. The mere fact that the panel changed its conclusion cannot, in the circumstances of this case, give rise to an inference that the board acted improperly.

[12] The appeal is dismissed with costs against the appellant.

3143-95-U (Court File No. 649/96) The Ontario Secondary School Teachers' Federation, District 40, Applicant v. Muskoka Board of Education and the Ontario Labour Relations Board, Respondents

Change in Working Conditions - Discharge - Judicial Review - Unfair Labour Practice - OSSTF applying to represent certain school board employees ten days after Board terminated bargaining rights held by OPEIU in respect of those employees - Employer discharging bargaining unit employee after OSSTF certified but before first collective agreement made - OSSTF alleging that discharge violating statutory freeze - Board declining to inquire into application on ground that OSSTF had failed to make out prima facie case and because inquiry would not serve labour relations purpose of statutory freeze - Application for judicial review dismissed by Divisional Court

Board decision not reported.

Ontario Court (General Division) Divisional Court, Maloney, Bell and Swinton JJ., March 9, 1998.

Maloney J. (Endorsement): This application is dismissed.

The standard of review in this case is "patent unreasonableness". In the Court's opinion the Board's interpretation of Section 86 of the Act was *not* patently unreasonable in its conclusion that the particular right contended for by the union was not preserved by "the freeze" and that Mr. Blundell's rights fell to be determined at Common Law. The matter before the Board was procedural and exclusively within the jurisdiction of the Board. The expertise of the Board in the field of labour relations enabled it to best assess the issues and policy considerations involved in this case. Furthermore the Board exercised its Sec. 96(4) discretion in an appropriate way. The applicant has failed to persuade us that there is any

basis for interfering with the Board's exercise of that discretion. Costs to the respondent Muskoka Board of Education fixed at \$3500.00. No costs to the Ontario Labour Relations Board.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1998

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Under Section 11 of the Act

3595-97-R: Service Employees Union Local 268 affiliated with the S.E.I.U. A.F of L., C.I.O., and C.L.C. (Applicant) v. Other Hands Inc. (Respondent)

Unit: "all employees of Other Hands Inc. in the City of Thunder Bay, save and except Coordinators, persons above the rank of Coordinator, and office and clerical staff" (41 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to Vote

2643-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jalex Roofing Ltd. (Respondent)

Unit: "all roofers and their helpers and metalmen in the employ of Jalex Roofing Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria; the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman, persons engaged in reroofing, hourly servicemen, flatroofers, aluminium/vinyl applicators, office, warehouse/shop and clerical employees" (3 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	1

3360-96-R: Labourers' International Union of North America Local 183 (Applicant) v. Newcastle Dunnage Service Incorporated (Respondent)

Unit: "all employees of Newcastle Dunnage Service Incorporated in the City of Mississauga save and except forepersons, persons above the rank of foreperson and save and except office, clerical and sales staff." (32 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	14

2452-97-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Skuce Welding & Piping Ltd. (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Intervener)

Unit: "all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of Skuce Welding & Piping Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice refrigeration and air conditioning mechanics in the employ of Skuce Welding & Piping Ltd. in all sectors of the construction industry in Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cramahe and all lands east thereof in the County of Northumberland, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0

2883-97-R: United Steelworkers of America (Applicant) v. Mega Blow Mouldings Ltd. (Respondent)

Unit: "all employees of Mega Blow Mouldings Ltd. in the City of Mississauga, save and except forepersons, persons above the rank of forepersons, office and sales staff" (78 employees in unit)

Number of names of persons on revised voters' list	86
Number of persons who cast ballots	73
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	68
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	68
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	3

2992-97-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Windsor Board of Education (Respondent)

Unit: "all painters and painters' apprentices in the employ of Windsor Board of Education in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Windsor Board of Education in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	7

3140-97-R: Centrale des syndicats francophones de l'Ontario (Applicant) v. Le Conseil des écoles séparées catholiques du district de Kirkland Lake-Timiskaming (Respondent)

Unit: "les secrétaires à l'emploi du Conseil des écoles séparées catholiques du district de Kirkland Lake-Timiskaming, dans son bureau administratif et dans ses écoles élémentaires et secondaires o le français est la langue d'enseignement en conformité avec la partie XII de la Loi sur l'éducation" (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12

Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

3467-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. Keewatin-Patricia District School Board, formerly known as the Kenora Board of Education (Respondent) v. Office and Professional Employees International Union (Intervener)

Unit: "all regular full-time and part-time educational assistants, library technicians and library clerks employed by the Kenora Board of Education" (41 employees in unit)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	34
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of ballots marked in favour of applicant	33
Number of ballots marked against applicant	1

3710-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Philips Services Corporation/Industrial Cleaning Group (Respondent)

Unit: "all employees of the Philips Services Corporation Industrial Cleaning Group, working at the Navistar Assembly Plant at 508 Richmond Street Chatham, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff," (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	4
Number of ballots segregated and not counted	1

3728-97-R: Brewery, General and Professional Workers' Union (Applicant) v. Wesley Urban Ministries Inc. (Respondent)

Unit: "all employees of the Wesley Urban Ministries Inc. in the City of Hamilton, save and except Directors, persons above the rank of Director, Minister, Events/Volunteer Co-ordinator, Assistant Controller, Administrative Assistant of Resource Development, Accounting/Clerical Assistant to Executive Director and students employed during the school vacation period" (57 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	36
Number of ballots marked in favour of applicant	20
Number of ballots marked against applicant	14
Number of ballots segregated and not counted	2

3767-97-R: Labourers' International Union of North America (Applicant) v. A.F.A. Finished Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of A.F.A. Finished Carpentry in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

3784-97-R: Ontario Nurses' Association (Applicant) v. Rideau Place, Ottawa (Respondent)

Unit: "all registered and graduate nurses employed by Rideau Place Retirement Residence in the City of Ottawa save and except the Director of Care and persons above the rank of Director of Care" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	7

3805-97-R: Ontario Nurses' Association (Applicant) v. Med-Emerg International Inc. (Respondent)

Unit: "all registered nurses and graduate nurses employed by Med-Emerg Inc. at the Lester B. Pearson International Airport Mississauga, Ontario, save and except the Nursing Manager and persons employed above the rank of Nursing Manager" (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	8

3831-97-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Wesway Inc. (Respondent)

Unit: "all employees of Wesway Inc. in the City of Thunder Bay, save and except supervisors, persons above the rank of supervisor and office and clerical staff" (112 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	112
Number of persons who cast ballots	72
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	69
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of applicant	60
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	1

3864-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Canadian Waste Services Inc. (Respondent)

Unit: "all employees of Canadian Waste Services Inc., in the Township of Zorra, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff and dispatcher" (28 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	26
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	8

3868-97-R: United Steelworkers of America (Applicant) v. Accura Molding Company Ltd. (Respondent)

Unit: “all employees of Accura Molding Company Ltd. in the Regional Municipality of Peel, save and except foreperson, persons above the rank of foreperson, office, clerical and sales staff” (139 employees in unit)

Number of names of persons on revised voters’ list	139
Number of persons who cast ballots	129
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	129
Number of ballots marked in favour of applicant	84
Number of ballots marked against applicant	45

3882-97-R: Northern Ontario Joint Council of the Retail, Wholesale and Department Store Union, District Council of the United Food and Commercial Workers International Union (Applicant) v. RVR Holdings Ltd. o/a Best Western (Respondent)

Unit: “all employees of RVR Holdings Ltd. operating as Best Western Timmins in Timmins, Ontario, save and except Department Heads, Comptroller and Secretary to the General Manager, and all those covered by a subsisting collective agreement with the applicant” (14 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	14
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	11
Number of segregated ballots cast by persons whose names appear on voter’s list	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

3884-97-R: Ontario Public Service Employees Union (Applicant) v. Hamilton Health Sciences Corporation (Respondent) v. Ontario Nurses’ Association (Intervener)

Unit: “all medical laboratory technologists, medical laboratory technicians and medical laboratory assistants employed by Hamilton Health Sciences Corporation in the Municipality of Hamilton/Wentworth, save and except technical specialists, Managers, and those above the rank of Manager and employees in bargaining units which any trade union held bargaining rights as of January 22, 1998” (160 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	160
Number of persons who cast ballots	129
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	127
Number of segregated ballots cast by persons whose names appear on voter’s list	2
Number of ballots marked in favour of applicant	73
Number of ballots marked against applicant	56

3892-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Loeb Inc. (Respondent)

Unit: “all employees of Loeb Inc. at its Fairway location, in the City of London, save and except Department Managers, persons above the rank of Department Manager, office and management trainees” (50 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	50
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	39
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	11

3912-97-R: United Steelworkers of America (Applicant) v. Formatop Manufacturing Company Limited (Respondent)

Unit: "all employees of Formatop Manufacturing Company Limited in the Township of Wilmot, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff and students employed through cooperative programs" (35 employees in unit)

Number of names of persons on revised voters' list	35
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	16

3917-97-R: Ontario Public Service Employees Union (Applicant) v. Bruce Peninsula Health Services (Respondent)

Unit: "all office and clerical employees of Bruce Peninsula Health Services in the County of Bruce, save and except supervisors, persons above the rank of supervisor, executive secretary and employees in the bargaining units for which any trade union held bargaining rights as of the date of application" (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

3926-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Alamo Rent-A-Car Inc. (Respondent)

Unit: "all employees of Alamo Rent-A-Car Inc. located at 221 Carlingview Drive in the City of Toronto, save and except supervisors and persons above the rank of supervisor" (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	5

3954-97-R: Canadian Union of Public Employees (Applicant) v. 1150111 Ontario Inc. cob Tilbury Park Lodge (Respondent)

Unit: "all employees of 1150111 Ontario Inc., cob, Tilbury Park Lodge, in the Corporation of the Municipality of Chatham/Kent, save and except administrator, and those above the rank of administrator" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	1

4078-97-R: Ontario Public Service Employees Union (Applicant) v. The Supportive Housing Coalition of Metropolitan Toronto (Respondent)

Unit: "all employees of Supportive Housing Coalition of Metropolitan Toronto in the City of Toronto, save and except managers, persons above the rank of manager, the executive assistant and the maintenance coordinator" (31 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	31
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	7

4100-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Amity Goodwill Industries (Respondent)

Unit: "all employees of Amity Goodwill Retail Division in the City of Hamilton, save and except Co-op students, assistant managers and those above the rank of assistant managers, constitute a unit of employees of the responding party appropriate for collective bargaining" (84 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	84
Number of persons who cast ballots	83
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	76
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	50
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	7

4120-97-R: Canadian Health Care Workers (C.H.C.W.) (Applicant) v. Oxford Regional Nursing Home (Respondent) v. London & District Service Workers' Union, Local 220 (Intervener)

Unit: "all employees of the Oxford Regional Nursing Home at Ingersoll, Ontario, save and except supervisors, persons above the rank of supervisor, registered, graduate and undergraduate nurses, activation co-ordinator, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	7

4148-97-R: Canadian Union of Public Employees (Applicant) v. Toronto District Heating Corporation (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: "all stationary engineers, millwrights and persons primarily engaged in the generation of steam at the Toronto District Heating Corporation's Pearl Street plant, save and except chief operating engineers and persons above the rank of chief operating engineer" (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16

Number of ballots marked in favour of applicant	16
Number of ballots marked in favour of intervener	0

Applications for Certification Dismissed Without Vote

4076-97-R: Ontario Nurses' Association (Applicant) v. Hamilton Health Sciences Corporation (McMaster site) (Respondent) v. Ontario Public Service Employees Union (Intervener)

Applications for Certification Dismissed Subsequent to Vote

2083-97-R: IWA - Canada, Local 1-1000 (Applicant) v. Hawkesbury Knitting Mills (Respondent)

Unit: "all employees in the employ of Hawkesbury Knitting Mills in the United Counties of Prescott and Russell, save and except supervisors and persons above the rank of supervisor, office and sales staff, and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	39
Number of segregated ballots cast by persons whose names do not appear on voters' list	7
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	24
Number of ballots segregated and not counted	7

2481-97-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Northstar Tile Ltd. (Respondent)

Unit: "all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers in the employ of Northstar Tile Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice marble, tile, terrazzo, cement masons, resilient floor layers and their helpers in the employ of Northstar Tile Ltd. in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (24 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	11
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	4

2498-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Esposito Bros. Construction Ltd. (Respondent)

Unit: "all construction labourers in the employ of Esposito Bros. Construction Ltd. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit)

3701-97-R: Brewery, General and Professional Workers' Union (Applicant) v. Sleeman Brewing & Malting Co. Ltd. (Respondent)

Unit: “all employees of the responding party at Guelph, Ontario, save and except managers, persons above the rank of manager, office, clerical and sales staff, and persons covered by a subsisting collective agreement between the responding party and the Sleeman Employee’s Association” (28 employees in unit)

Number of names of persons on revised voters’ list	31
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	22
Number of segregated ballots cast by persons whose names appear on voter’s list	4
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	23

3817-97-R: United Steelworkers of America (Applicant) v. Serpac Containers Limited (Respondent)

Unit: “all employees of Serpac Containers Limited in the City of Cambridge, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff” (87 employees in unit)

Number of names of persons on revised voters’ list	87
Number of persons who cast ballots	86
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	85
Number of segregated ballots cast by persons whose names appear on voter’s list	1
Number of ballots marked in favour of applicant	28
Number of ballots marked against applicant	58

3933-97-R: London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Sacred Heart of Jesus Christ (Respondent)

Unit: “all employees of Sacred Heart of Jesus Christ in Norfolk Township, save and except supervisors, persons above the rank of supervisors, registered and graduate nurses and office and clerical staff” (39 employees in unit)

Number of names of persons on revised voters’ list	39
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	36
Number of segregated ballots cast by persons whose names appear on voter’s list	3
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	22
Number of ballots segregated and not counted	2

3936-97-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. G.P. Flakeboard Limited (Respondent)

Unit: “all employees of G.P. Flakeboard Ltd. in the City of Sault Ste. Marie, save and except production manager, persons above the rank of production manager, training coordinator, purchasing supervisor, safety coordinator, lab specialist, human resource personnel, office, and sales staff” (83 employees in unit)

Number of names of persons on revised voters’ list	83
Number of persons who cast ballots	82
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	82
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	56

4101-97-R: Canadian Health Care Workers (C.H.C.W.) (Applicant) v. Trinity Village Care Centre (Respondent) v. London & District Service Workers’ Union, Local 220 (Intervener)

Unit: “all employees of Trinity Village Care Centre at Kitchener, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, supervisors,

persons above the rank of foreman and supervisor, professional nursing staff and office staff' (76 employees in unit)

Number of names of persons on revised voters' list	76
Number of persons who cast ballots	56
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	49
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	22
Number of ballots marked in favour of intervener	28
Number of ballots segregated and not counted	5

4121-97-R: Canadian Health Care Workers (C.H.C.W.) (Applicant) v. Trinity Village Care Centre (Respondent) v. London & District Service Workers' Union, Local 220 (Intervener)

Unit: "all employees of the Trinity Village Care Centre at Kitchener, Ontario, save and except foremen, supervisors, persons above the rank of foreman and supervisor, professional nursing staff, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period," (53 employees in unit)

Number of names of persons on revised voters' list	53
Number of persons who cast ballots	41
Number of ballots marked in favour of applicant	17
Number of ballots marked in favour of intervener	21
Number of ballots segregated and not counted	3

4124-97-R: Canadian Health Care Workers (C.H.C.W.) (Applicant) v. Oxford Regional Nursing Home (Respondent) v. London & District Service Workers' Union, Local 220 (Intervener)

Unit: "all employees of the Oxford Regional Nursing Home at Ingersoll, Ontario, regularly employed for not more than twenty-four hours per week, save and except registered and undergraduate nurses, activation co-ordinator, Supervisors, persons above the rank of Supervisor, office and clerical staff, persons employed for more than 24 hours per week and students employed during the school vacation period," (46 employees in unit)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	38
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of ballots marked in favour of applicant	18
Number of ballots marked in favour of intervener	20

4149-97-R: Independent Paperworkers of Canada (Applicant) v. Livingston Health Care Services Inc. (Respondent)

Unit: "all permanent employees of the company, located at Oakville, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, employees hired for twenty-four hours per week or less, and temporary employees." (33 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	33
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	20

4153-97-R: Service Employees' Union, Local 210 (Applicant) v. Family Service Kent (Respondent)

Unit: “all employees of Family Service Kent in Kent County save and except supervisors and persons above the rank of supervisor.” (21 employees in unit)

Number of names of persons on revised voters’ list	21
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	18
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	10

4158-97-R: United Brotherhood of Retail, Food, Industrial & Service Trades, International Union (Applicant) v. Confectionately Yours, Inc. (Respondent) v. Bakery, Confectionery and Tobacco Workers International Union, Local 264 (Intervener)

Unit: “all of its employees in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff and drivers” (124 employees in unit)

Number of names of persons on revised voters’ list	124
Number of persons who cast ballots	84
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	81
Number of segregated ballots cast by persons whose names do not appear on voters’ list	3
Number of ballots marked in favour of applicant	39
Number of ballots marked in favour of intervener	42
Number of ballots segregated and not counted	3

Applications for Certification Withdrawn

4040-95-R: IWA-Canada (Applicant) v. ZCL Fiberglass Ltd. (Respondent) (*Terminated*)

1144-97-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Lafarge Canada Inc. (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 141 (Intervener)

4210-97-R: United Steelworkers of America (Applicant) v. Hamilton-Wentworth Protection Services (1991) Limited (Respondent) v. United Food & Commercial Workers, Local 206 (Intervener)

FIRST AGREEMENT - DIRECTION

3999-96-FC: Canadian Union of Public Employees, and its Local 3875 (Applicant) v. Native Child and Family Services of Toronto (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0700-95-R: Ontario Pipe Trades Council, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Smith & Martin Limited, and Aqua-flow Mechanical Ltd. (Respondents) (*Withdrawn*)

0702-95-R: Ontario Pipe Trades Council, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicants) v. Bren Mechanical Contractors Limited, and Markham Village Plumbing & Mechanical Ltd., and Markham Village Plumbing & Mechanical Group Ltd., and Lynn Mechanical (Respondents) (*Withdrawn*)

2696-96-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Westinghouse Electric Corporation, Westinghouse Canada Inc. (Respondents) (*Dismissed*)

3142-96-R: Graphic Communications International Union Local 500M (Applicant) v. Batten Graphics Limited, Cybergraphics, Digital Creative Studios and Printernet (Respondents) v. Communications, Energy and Paperworkers Union, Local 91-0, Toronto Typographical Union (Intervener) (*Withdrawn*)

1192-97-R: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. Skyway Equipment Co. Limited, Mobile Manpower Systems Inc., E & D Scaffold Services Ltd., Matthews Equipment Limited, Highrise/Matthews Equipment Ltd. (Respondents) (*Terminated*)

1381-97-R: IWA-Canada, Local 1000 (Applicant) v. John Malcolm/Wooden Nails and Thomco Pallet Repair Service Division of 835266 Ontario Inc. (Respondents) (*Withdrawn*)

1603-97-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508 (Applicant) v. Huxson Bros. Plumbing & Heating Ltd. and W. Huxson Plumbing & Heating Limited (Respondents) (*Withdrawn*)

1621-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Fordyce and Frampton Electrical Contractors Limited and D.S.F. Electrical Contractor Ltd. (Respondents) (*Endorsed Settlement*)

2359-97-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. R. C. Enterprises (Windsor) Ltd. and Cassolato Painting & Decorating Limited (Respondents) (*Endorsed Settlement*)

3685-97-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Maramar Marble Inc., East Tiles Co. Ltd. and Bertoia Tiles (Respondents) (*Terminated*)

SALE OF A BUSINESS

0700-95-R: Ontario Pipe Trades Council, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Smith & Martin Limited, and Aqua-flow Mechanical Ltd. (Respondents) (*Withdrawn*)

0702-95-R: Ontario Pipe Trades Council, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicants) v. Bren Mechanical Contractors Limited, and Markham Village Plumbing & Mechanical Ltd., and Markham Village Plumbing & Mechanical Group Ltd., and Lynn Mechanical (Respondents) (*Withdrawn*)

2696-96-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Westinghouse Electric Corporation, Westinghouse Canada Inc. (Respondents) (*Dismissed*)

3142-96-R: Graphic Communications International Union Local 500M (Applicant) v. Batten Graphics Limited, Cybergraphics, Digital Creative Studios and Printernet (Respondents) v. Communications, Energy and Paperworkers Union, Local 91-0, Toronto Typographical Union (Intervener) (*Withdrawn*)

0027-97-R: Praxair Canada Inc. (Applicant) v. United Steelworkers of America, Local 12998 (Respondent) v. Communications, Energy and Paperworkers Union, Local 593 (Intervener) (*Granted*)

1174-97-R: Carpenters & Allied Workers Local 27, United of Carpenters and Joiners of America (Applicant) v. Dell'Angelo Bros. Roofing & Tinsmith Limited, Garview Roofing Contractors & Associates Ltd. (Respondents) (*Withdrawn*)

1192-97-R: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. Skyway Equipment Co. Limited, Mobile Manpower Systems Inc., E & D Scaffold Services Ltd., Matthews Equipment Limited, Highrise/Matthews Equipment Ltd. (Respondents) (*Terminated*)

1381-97-R: IWA-Canada, Local 1000 (Applicant) v. John Malcolm/Wooden Nails and Thomco Pallet Repair Service Division of 835266 Ontario Inc. (Respondents) (*Withdrawn*)

1603-97-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 508 (Applicant) v. Huckson Bros. Plumbing & Heating Ltd. and W. Huckson Plumbing & Heating Limited (Respondents) (*Withdrawn*)

1621-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Fordyce and Frampton Electrical Contractors Limited and D.S.F. Electrical Contractor Ltd. (Respondents) (*Endorsed Settlement*)

1967-97-R: International Association of Machinists & Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Kam Auto Collision Centre (Respondent) (*Granted*)

2359-97-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. R. C. Enterprises (Windsor) Ltd. and Cassolato Painting & Decorating Limited (Respondents) (*Endorsed Settlement*)

2632-97-R: Access Centre for Community Care in Lanark, Leeds and Grenville (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

2633-97-R: Access Centre for Community Care in Lanark, Leeds and Grenville (Applicant) v. Canadian Union of Public Employees and its Local 1559 (Respondent) (*Granted*)

3661-97-R: The Etobicoke Children's Centre (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Granted*)

3685-97-R: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Maramar Marble Inc., East Tiles Co. Ltd. and Bertoia Tiles (Respondents) (*Terminated*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2610-97-R: Marilyn Gellner (Applicant) v. Christian Labour Association of Canada (Respondent) v. Ambassador Building Maintenance Limited (Intervener)

Unit: "all employees of Ambassador Building Maintenance Limited working in or dispatched from a location in the counties of Kent and Lambton, save and except supervisors, persons above the rank of supervisor and office staff." (23 employees in unit) (*Granted*)

3678-97-R: Serafino A. Gentili (Applicant) v. Office & Professional Employees International Union (Respondent)

Unit: "The union is recognized as the sole collective bargaining agent for all Agents and PR Reps, exclusive of supervisory employees with authority to hire, transfer, suspend, lay-off, recall, promote, discharge or discipline personnel, or effectively to recommend such action, if the exercise of such authority is not of merely routine nature but requires the use of independent judgment. A person having a General Agent, Master General Agent, or Provincial General Agent, contract with the Company has such authority and is not a member of the bargaining unit." (54 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	24
Number of ballots marked in favour of respondent	2
Number of ballots marked against respondent	22
Number of ballots segregated and not counted	1

3704-97-R: Serafino A. Gentili (Applicant) v. Office & Professional Employees International Union (Respondent)

Unit: "The Union is recognized as the sole collective bargaining agent for all clerical employees, exclusive of supervisory employees with authority to hire, transfer, suspend, lay-off, recall, promote, discharge or discipline personnel, or effectively to recommend such action, if the exercise of such authority is not of merely routine nature but requires the use of independent judgment. A person having a General Agent, Master General Agent, or

Provincial General Agent, contract with the Company has such authority and is not a member of the bargaining unit.” (4 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	4
Number of persons who cast ballots	3
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	0

3874-97-R: Cheryl Grant, et al (Applicant) v. Service Employees Union and Its Local 183 (Respondent) v. Quinte Manor Retirement Home (Intervener)

Unit: “all employees of Quinte Manor Retirement Home in the Township of Hallowell, save and except Assistant Managing Director, persons above the rank of Assistant Managing Director, Dietary Manager, Office and Clerical Staff” (17 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	18
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	16
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	9

4152-97-R: Brian LaBossiere and David Kalcz (Applicant) v. Teamsters Chemical, Energy and Allied Workers Local Union No. 424 (Respondent) v. ISP (Canada) Inc. (Intervener) (*Granted*)

4197-97-R: M. Lionel Fournier and M. Luc Chaumont (Applicant) v. United Textile Workers of America - Local 565 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

2977-97-U: Windsor Match Plate & Tool Limited (Applicant) v. The National Union of Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW-Canada) and its Local 195 and Basil Hargrove, Michael Renaud, Robert Cruise, Gerry Logan, Chip Lemany and John McEachern (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

4213-97-U: Doug Clark (Applicant) v. Ontario Secondary School Teachers’ Federation (Respondent) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2085-97-U: IWA Canada, Local 2693 (Applicant) v. Avenor Inc. Thunder Bay Woodlands Operations (Respondent) (*Withdrawn*)

3779-97-U: Power Workers’ Union (Applicant) v. Ontario Hydro (Respondent) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1600-96-U: Ontario Public Services Employees Union and its Local 150 (Applicant) v. Wallaceburg & Sydenham District Association for Community Living (Respondent) (*Withdrawn*)

2138-96-U: The Ontario Nurses’ Association (Applicant) v. The Board of Health of the Haliburton, Kawartha, Pine Ridge District Health Unit (Respondent) (*Withdrawn*)

3141-96-U: Graphic Communications International Union Local 500M (Applicant) v. Batten Graphics Limited, Cybergraphics, Digital Creative Studios and Printernet (Respondents) (*Withdrawn*)

0863-97-U: Arnold Cecile and Norm Lauzon (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 195 and Riverside Fabricating Ltd. (Respondents) (*Withdrawn*)

1044-97-U: IWA Canada, Local 2693 (Applicant) v. Longlac Wood Industries Inc. (Respondent) (*Withdrawn*)

1161-97-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Fortino's Plains Road Limited c.o.b. as Fortino's (Respondent) (*Withdrawn*)

1475-97-U: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. The Electrical Power Systems Construction Association and Ontario Hydro (Respondents) v. International Brotherhood Of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers And Helpers, Local 128 (Intervener) (*Withdrawn*)

1794-97-U: United Food and Commercial Workers Union, Local 1977 (Applicant) v. Westmount Road Dutch Boy, a Division of Oshawa Holdings Ltd. (Respondent) (*Withdrawn*)

1875-97-U: IWA Canada, Local 2693 (Applicant) v. Avenor Inc. Thunder Bay Woodlands Operations (Respondent) (*Withdrawn*)

2129-97-U: Service Employees Union, Local 183 (Applicant) v. Edgewood Care Centre (Respondent) (*Withdrawn*)

2145-97-U: IWA - Canada, Local 1-1000 (Applicant) v. Hawkesbury Knitting Mills (Respondent) (*Withdrawn*)

2311-97-U: Marilyn Farrell (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of United Steelworkers of America, Mary McArthur and Cindy Dupuis (Respondents) v. Wal-Mart Canada Inc. (Intervener) (*Dismissed*)

2312-97-U: Marie LeBlanc (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of United Steelworkers of America (Respondent) v. Wal-Mart Canada Inc. (Intervener) (*Dismissed*)

2313-97-U: Alvina Stephenson (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of United Steelworkers of America, and Mary McArthur (Respondents) v. Wal-Mart Canada Inc. (Intervener) (*Dismissed*)

2314-97-U: Pam Girard (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of United Steelworkers of America, and Roger Falconer, National Education Director of the United Steelworkers of America (Respondents) v. Wal-Mart Canada Inc. (Intervener) (*Dismissed*)

2315-97-U: Patricia Scotland (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of United Steelworkers of America, Peter Thomas, and Marie Kelly, Legal Counsel, United Steelworkers of America (Respondents) v. Wal-Mart Canada Inc. (Intervener) (*Dismissed*)

2537-97-U: Al Chambo, David Foss, Randy Ibey, Martin Medland, Ian O'Brien, Mark O'Heron, Mike Stefaro, and Stewart Shields (Applicants) v. Retail, Wholesale Canada Division of the United Steelworkers of America, and National Grocers Co. Ltd. (Respondents) (*Dismissed*)

2574-97-U: Janet Poel (Applicant) v. Canadian Union of Public Employees Local 1146 (Respondent) (*Withdrawn*)

2666-97-U: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Pierre Carriere, Les Entreprises d'Electricite Pierre Carriere Limitee, Michel Gallant (Respondent) (*Terminated*)

2684-97-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Maple Leaf Poultry (Respondent) (*Withdrawn*)

2739-97-U: Rose Loscher (Applicant) v. OPSEU Union Local 142 (Respondent) v. Hotel-Dieu Grace Hospital (Intervener) (*Withdrawn*)

2788-97-U: Patricia Scotland, Pam Girard, Marie LeBlanc, Marilyn Farrell, Alvina Stephenson (Applicant) v. Retail Wholesale Canada Canadian Service Sector Division of United Steelworkers of America (Respondent) (*Dismissed*)

2815-97-U: Elizabeth Dutka (Applicant) v. Essex County Board of Education (Respondent) (*Withdrawn*)

2835-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Freightliner of Canada Ltd. (Respondent) (*Withdrawn*)

2905-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 195 (Applicant) v. Windsor Match Plate and Tool Limited and Harold Reaume (Respondent) (*Withdrawn*)

2949-97-U: Les Parsons (Applicant) v. UFCW Local 175 and 633 (Respondent) v. Maple Leaf Meats (Intervener) (*Withdrawn*)

3062-97-U: Gaetane Gieuvre (Applicant) v. Canadian Union of Public Employees Local 161 (Respondent) v. Laurentian Hospital (Intervener) (*Withdrawn*)

3118-97-U: Augustus Mullins (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 440 (Respondent) v. Oetker Ltd. (Intervener) (*Withdrawn*)

3172-97-U: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses - Durham Region Branch (Respondent) (*Withdrawn*)

3224-97-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Maxi & Co. (Respondent) (*Withdrawn*)

3268-97-U: Vince Defazio (Applicant) v. Glass, Molders, Pottery, Plastics & Allied Workers International Union (Respondent) v. Wabash Alloys Ontario (Intervener) (*Withdrawn*)

3282-97-U: Canadian Union of Public Employees, Local 2487-01 (Applicant) v. Manitoulin Ambulance Service (Respondent) (*Withdrawn*)

3309-97-U: Tony Devonish (Applicant) v. C.A.W. Local 4216 (Respondent) (*Withdrawn*)

3378-97-U: Local 400 F.W.D., International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (Applicant) v. Boehmer Box Corporation, A Division of A. & C. Boehmer Limited (Respondent) (*Withdrawn*)

3384-97-U: Inez Fudge (Applicant) v. Consumers Glass Inc., Aetna Inc. Co., (Local 203 Brick & Aluminum and Steelworkers Union) (Respondents) (*Withdrawn*)

3398-97-U: United Food and Commercial Workers International Union, Local 175 & 633 (Applicant) v. Collingwood Nursing Home (Respondent) (*Withdrawn*)

3402-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Norma Products of Canada Ltd. (Respondent) (*Withdrawn*)

3454-97-U: The Peterborough Typographical Union, Local 248 (Applicant) v. Sterling Newspaper Co. c.o.b. The Lindsay Daily Post (Respondent) (*Dismissed*)

3457-97-U: Giuseppe Cara (Applicant) v. Metropolitan Toronto Elementary Unit of the Ontario English Catholic Teachers Association (Respondent) (*Dismissed*)

3488-97-U: Hongxu Zhang (Applicant) v. Service Employees International Union Local 204 (Respondent) (*Withdrawn*)

3537-97-U: Darrin Humby, Tom Kern, Richard Lalonde, Tim Fish, Dan Shepley (Applicant) v. Bill Smart, USWA Local 9143 and William Steep, USWA District #6 (Respondents) (*Dismissed*)

3609-97-U: United Steelworkers of America (Applicant) v. Guardian Protection Services Ltd. (Respondent) (*Withdrawn*)

3638-97-U: Oscar Tan (Applicant) v. CAW Local 1980 Ron Hendrikx (President) (Respondent) (*Withdrawn*)

3922-97-U: Jaginder Sani (Applicant) v. Booth Centennial (Respondent) (*Dismissed*)

3929-97-U: Ramji Firoz (Applicant) v. United Food and Commercial Workers Union Local 351 Union, Harbour Castle Westin Hotel (Respondents) (*Dismissed*)

3932-97-U: Irwin Parker (Applicant) v. Liquor Control Board of Ontario (Respondent) (*Dismissed*)

4071-97-U: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O., and C.L.C. (Applicant) v. Other Hands Inc. (Respondent) (*Withdrawn*)

4087-97-U: Ivo Kounty (Applicant) v. Peter Bottomley for Chrysler Canada Ltd. Bramalea Assembly Plant (Respondent) (*Dismissed*)

4092-97-U: Upinder Pal Singh Anand (Applicant) v. Custom Trim Ltd. (Respondent) (*Dismissed*)

4164-97-U: Edward Andy Hordienko (Applicant) v. Maple Leaf Foods (Respondent) (*Dismissed*)

4353-97-U: Richard Allan Lequyere (Applicant) v. The Bruce-Grey Catholic District School Board (Respondent) (*Dismissed*)

4359-97-U: Vicente Yu (Applicant) v. Goodwill Industries and Teamster Union International, Local 847 (Respondents) (*Dismissed*)

4405-97-U: Jasmine Javid (Applicant) v. Canadian Airlines (Sylvia Trider) (Respondent) (*Dismissed*)

4419-97-U: Michael D. Flynn (Applicant) v. C.A.W. National Union (Respondent) (*Dismissed*)

4453-97-U: Janice Marie Marshall (Applicant) v. S.E.I.U. Local 268 (Respondent) (*Dismissed*)

4465-97-U: Agnieszka (Agnes) Chudzik (Applicant) v. Custom Trim Ltd. (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

3715-97-M: Amalgamated Transit Union, Local 1703 (Applicant) v. McDonnell-Ronald Limousine Service Limited, c.o.b. as Airline Limousine (Respondent) (*Dismissed*)

4089-97-M: Ivo Koutny (Applicant) v. Peter Bottomley (Supervisor) Chrysler Canada Bramalea Assembly Plant (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO PROSECUTE

2990-97-U: Windsor Match Plate & Tool Limited (Applicant) v. The National Union of Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW-Canada) and its Local 195 and Basil Hargrove, Michael Renaud, Robert Cruise, Gerry Logan, Chip Lemany and John McEachern (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2819-97-M: Mylex Limited (Applicant) v. Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847 (Respondent) (*Withdrawn*)

3879-97-M: United Food and Commercial Workers Union, Local 351 (Applicant) v. Kannco Inc. Modern Cleaners (Respondent) (*Granted*)

4171-97-M: Trenergy Inc. (Applicant) v. United Steelworkers of America Local 6519 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

2948-96-JD: United Brotherhood of Carpenters and Joiners of America, Locals 2486 and 1669 (Applicant) v. Atco Noise Management, a division of Atco Structures Inc., Industrial Cladding Ltd., Fab Air Metal Industries Inc., Ontario Sheet Metal Workers and Roofers' Conference (Respondents) (*Granted*)

1704-97-JD: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Labourers' International Union of North America, Local 183, Labourers' International Union of North America, Local 837, Labourers' International Union of North America, Local 506, Labourers' International Union of North America, Ontario Provincial District Council, Well-Bur Construction Ltd., and Granville Constructors Ltd. (Respondents) (*Dismissed*)

2577-97-JD: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Labourers' International Union of North America, Local 1036 and BFC Industrial - Nicholls Radtke Ltd. (Respondents) (*Granted*)

3178-97-JD: Sheet Metal Workers' International Association, Local 235 (Applicant) v. United Brotherhood of Carpenters' and Joiners' of America, Local 494, Performance Metals, Drew Enterprises, Peerless Enterprises, Ryco-Alberici, A Joint Venture (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3921-97-M: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Butcher Engineering Enterprises Ltd. (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1691-96-OH: Vicente Garcia (Applicant) v. Incentours Incorporated (Respondent) (*Withdrawn*)

0190-97-OH: Jacqueline Griffith-Silvera (Applicant) v. Her Majesty the Queen in the Right of Ontario (Ontario Human Rights Commission) (Respondent) (*Terminated*)

1983-97-OH: Brian Nash, Worker Committee Member of The Arrow Road Joint Health and Safety Committee (Applicant) v. Toronto Transit Commission (Respondent) v. Amalgamated Transit Union, Local 113 (Intervener) (*Withdrawn*)

2113-97-OH; 2180-97-OH; 2641-97-OH: Brian Nash, Worker Committee Member of The Arrow Road Joint Health and Safety Committee (Applicant) v. Toronto Transit Commission (Respondent) v. Toronto Transit Commission Amalgamated Transit Union, Local 113 (Intervener) (*Dismissed*)

2447-97-OH: Margaret Elizabeth Harrington (Applicant) v. Web Printing/Brabant Newspapers (Respondent) (*Dismissed*)

3018-97-OH: Robert G. Walker (Applicant) v. Jan Lumber Co. Ltd. (Respondent) (*Withdrawn*)

3197-97-OH: C. Ryan Gougeon (Applicant) v. Wigwam Knitting Ltd. (Respondent) (*Withdrawn*)

3226-97-OH: Meredith Munger (Applicant) v. Research Casting International (Respondent) (*Withdrawn*)

3322-97-OH: Jack Armstrong (Applicant) v. 1106488 Ontario Limited, carrying on business as Buckhorn Sand & Gravel (Respondent) (*Withdrawn*)

3793-97-OH: Lisa Ann Mowat (Applicant) v. Fishburn Proctor Ltd. (Respondent) (*Withdrawn*)

3800-97-OH: Frank J. Poley (Applicant) v. General Motors of Oshawa (Respondent) (*Withdrawn*)

4088-97-OH: Ivo Koutny (Applicant) v. Peter Bottomley (Supervisor) Bramalea Assembly Plant Chrysler Canada (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

0699-95-G: Ontario Pipe Trades Council, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Smith & Martin Limited, and Aqua-flow Mechanical Ltd. (Respondents) (*Withdrawn*)

0701-95-G: Ontario Pipe Trades Council, and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicants) v. Bren Mechanical Contractors Limited, and Markham Village Plumbing & Mechanical Ltd., and Markham Village Plumbing & Mechanical Group Ltd., and Lynn Mechanical (Respondents) (*Withdrawn*)

1132-95-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Jaddco Anderson Limited (Respondent) v. General Presidents' Maintenance Committee for Canada, The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (Interveners) (*Granted*)

1655-96-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Better Iron Works Ltd. (Respondent) (*Endorsed Settlement*)

1942-96-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Bennett & Wright Limited (Respondent) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Intervener) (*Withdrawn*)

2116-96-G; 0092-97-G: Labourers' International Union of North America, Local 527 (Applicant) v. Vantage Utilities Ltd., Denis Brisbois Contractors Ltd., Denis Brisbois Holdings Ltd. (Respondents); Labourers' International Union of North America, Local 527 (Applicant) v. Vantage Utilities Ltd., Denis Brisbois Holdings Ltd., Denis Brisbois Contractors Ltd., 1091857 Ontario Inc. operating as Orleans Utilities (Respondents) (*Endorsed Settlement*)

2554-96-G; 2555-96-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) v. International Union of Elevator Constructors, Local 102, International Union Of Elevator Constructors (Interveners) (*Withdrawn*)

2556-96-G; 2557-96-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. and Dover Corporation (Canada) Limited (Respondent) v. International Union of Elevator Constructors, Local 102, International Union of Elevator Constructors (Interveners) (*Withdrawn*)

1152-97-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Bennett & Wright Limited (Respondent) (*Withdrawn*)

1191-97-G: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. Skyway Equipment Co. Limited, Mobile Manpower Systems Inc., E & D Scaffold Services Ltd., Matthews Equipment Limited, Highrise/Matthews Equipment Ltd. (Respondents) (*Terminated*)

1315-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Aberfoyle Crane Rental (Respondent) (*Granted*)

1622-97-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Fordyce and Frampton Electrical Contractors Limited and, D.S.F. Electrical Contractor Ltd. (Respondents) (*Endorsed Settlement*)

1914-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Victory Plumbing Inc. (Respondent) (*Granted*)

2383-97-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494 (Applicant) v. R. C. Enterprises (Windsor) Ltd. and Cassolato Painting & Decorating Limited (Respondents) (*Endorsed Settlement*)

3061-97-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Charles Leclair c.o.b. as C. Leclair Electric and 980667 Ontario Inc. (Respondent) (*Endorsed Settlement*)

3217-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. E.S. Fox Ltd. (Respondent) (*Withdrawn*)

3316-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Norstar Mechanical Ltd. (Respondent) (*Granted*)

3569-97-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)

3682-97-G: International Union of Bricklayers and Allied Craftsmen, Local 31 (Applicant) v. Maramar Marble Inc., East Tiles Co. Ltd. and Bertoia Tiles (Respondents) (*Terminated*)

3687-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. A & R Carpentry Ltd. (Respondent) (*Withdrawn*)

3698-97-G: Masonry Council of Unions, Toronto and Vicinity, Bricklayers Masons Independent Union of Canada, Local 1, Labourers' International Union of North America, Local 183 (Applicants) v. Gimar Masonry Contracting Limited (Respondent) (*Withdrawn*)

3706-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mariofino Contracting Inc. (Respondent) (*Endorsed Settlement*)

3708-97-G: International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Service Glass & Mirror Ltd. (Respondent) (*Endorsed Settlement*)

3729-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Andrew Paving & Engineering Ltd. (Respondent) (*Withdrawn*)

3778-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Fusillo Group Ltd. (Respondent) (*Endorsed Settlement*)

3785-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Aspen Concrete & Drain Inc. (Respondent) (*Endorsed Settlement*)

3813-97-G: International Brotherhood of Painters and Allied Trades, Local 200 (Applicant) v. Presley Painting & Decorating (Respondent) (*Endorsed Settlement*)

3823-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lopes Drywall and Acoustics Inc. (Respondent) (*Withdrawn*)

3826-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Melin Interior Systems Inc. (Respondent) (*Withdrawn*)

3833-97-G; 4201-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Paul Richens o/a P.A. Richens Carpentry (Respondent) (*Endorsed Settlement*)

3850-97-G: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Lopes Drywall & Acoustics Inc. (Respondent) (*Endorsed Settlement*)

3851-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Cesaroni Contracting (Respondent) (*Withdrawn*)

3878-97-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. R.S. Airway Sheet Metal Inc. (Respondent) (*Granted*)

3885-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Scott Lathing Plastering and Acoustics (Respondent) (*Withdrawn*)

3935-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Battaglia Contracting, Division of 949590 Ontario Inc. (Respondent) (*Endorsed Settlement*)

3944-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Castro Investors and Builders Ltd. (Respondent) (*Withdrawn*)

3949-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rose Interiors Limited (Respondent) (*Withdrawn*)

3951-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Penco Drywall Ltd. (Respondent) (*Withdrawn*)

3953-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Crystal Drywall Systems Ltd. (Respondent) (*Withdrawn*)

3956-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. P & E Drywall Ltd. (Respondent) (*Withdrawn*)

4068-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ciro Excavating & Grading Ltd. (Respondent) (*Endorsed Settlement*)

4074-97-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. 974177 Ontario Ltd. carrying on business as Critical Construction, and 170603 Canada Inc. carrying on business as Critical Path Project Management (Respondents) (*Endorsed Settlement*)

4075-97-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Ronco Interior Systems Inc. (Respondent) (*Granted*)

4082-97-G: United Brotherhood of Carpenters and Joiners of America - Lake Ontario District Council (Applicant) v. Beaver Lumber Company Ltd. (Respondent) (*Withdrawn*)

4086-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Skeates Contracting Inc. (Respondent) (*Withdrawn*)

4093-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. P.S.P. Erectors Inc. (Respondent) (*Endorsed Settlement*)

4126-97-G: International Brotherhood of Painters & Allied Trades, Glaziers Local 1819 (Applicant) v. Gaudet Glass & Aluminum Co. Ltd. (Respondent) (*Endorsed Settlement*)

4137-97-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent) (*Withdrawn*)

4145-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. E.S. Fox Ltd. (Respondent) (*Withdrawn*)

4146-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. E. S. Fox Ltd. (Respondent) (*Withdrawn*)

4176-97-G; 4177-97-G: Labourers' International Union of North America, Local 607 (Applicant) v. Jared Enterprises Inc. (Respondent) (*Granted*)

4296-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Industrial Commercial Insulation and Contracting (Sault) Ltd. (Respondent) (*Withdrawn*)

4334-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Don Valley Electric (919937 Ontario Limited) (Respondent) (*Withdrawn*)

4373-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Star West Plaster & Cement Finishing Inc. (Respondent) (*Withdrawn*)

4381-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Matlor Steel Construction Limited (Respondent) (*Withdrawn*)

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

2837-97-U: Ottawa-Carleton Regional Residential Treatment Centre (Applicant) v. Canadian Union of Public Employees, Local 2376 (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0094-97-U; 0101-97-U: Jacques Tremblay (Applicant) v. La Fraternité unie des charpentiers et des menuisiers d'Amérique, section locale 93, Ottawa (Respondent) (*Dismissed*)

0303-97-U; 0305-97-U: Al Chambo, David Foss, Randy Ibey, Martin Medland, Ian O'Brien, Mark O'Heron, Mike Stefanoy, and Stewart Shields (Applicants) v. National Grocers Co. Ltd. (Respondent) v. Retail, Wholesale Canada Division of the United Steelworkers of America (Intervener); Al Chambo, David Foss, Randy Ibey, Martin Medland, Ian O'Brien, Mark O'Heron, Mike Stefanoy and Stewart Shields (Applicants) v. Retail, Wholesale Canada Division of the United Steelworkers of America (Respondent) v. National Grocers Co. Ltd. (Intervener) (*Dismissed*)

1538-97-U: Vince Sessa (Applicant) v. Teamsters Local Union 938 (Respondent) v. Cott Beverages Inc. (Intervener) (*Dismissed*)

3929-97-U: Ramji Firoz (Applicant) v. United Food and Commercial Workers Union, Local 351, Harbour Castle Westin Hotel (Respondent) (*Denied*)

4087-97-U; 4088-97-OH; 4089-97-M: Ivo Kounty (Applicant) v. Peter Bottomley for Chrysler Canada Ltd. Bramalea Assembly Plant (Respondent) (*Dismissed*)

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1998

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1331-95-R: Labourers' International Union of North America, Local 183 (Applicant) v. M & A Tile Company Limited (Respondent)

Unit: "all marble, tile and terrazzo, cement masons and resilient floor layers and their helpers and their respective apprentices, improvers and working foremen employed by M & A Tile Company Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

Bargaining Agents Certified Subsequent to Vote

2953-97-R: Christian Labour Association of Canada (Applicant) v. Canadian Waste Services Inc. (Respondent)

Unit: "all employees and dependent contractors of Canadian Waste Services Inc. working in the County of Lambton, save and except supervisors, persons above the rank of supervisor, office and clerical staff, students employed during the school vacation period and employees otherwise represented by a trade union" (35 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	51
Number of persons who cast ballots	39
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

3374-97-R: Ontario Public Service Employees Union (Applicant) v. Marriott Corporation of Canada Limited (Respondent)

Unit: "all Facilities employees of the Marriott Corporation of Canada Limited at its Marriott Management Services Division, engaged in cleaning services at the Hamilton Health Sciences Corporation, MacMaster and Chedoke sites, in the Regional Municipality of Hamilton - Wentworth, save and except supervisors, persons above the rank of supervisor, and employees in the bargaining units for which any trade union held bargaining rights on December 10, 1997" (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	19
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	0

3412-97-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit #1: "all Child and Youth Workers which were formerly employed by The Board of Education for the City of Toronto, but are now currently employed by the Toronto District School Board" (28 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0

Unit #2: "all Sign Language Facilitators which were formerly employed by The Board of Education for the City of Toronto, but are now currently employed by the Toronto District School Board" (28 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0

Unit #3: "all E.S.L. Intake Workers which were formerly employed by The Board of Education for the City of Toronto, but are now currently employed by the Toronto District School Board" (28 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	0

3857-97-R: Service Employees' Union, Local 210 (Applicant) v. The Corporation of The Township of Albemarle (Respondent)

Unit: "all employees of the Corporation of The Township of Albemarle in the Township of Albemarle, save and except supervisors, persons above the rank of supervisor, office & clerical and technical" (3 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	4
Number of ballots segregated and not counted	1

4084-97-R: Canadian Union of Public Employees (Applicant) v. C.A.W. Community Development Group (Respondent)

Unit: "all employees of the CAW Community Development Group, save and except Directors, Portfolio Administrators and persons above the rank of Director and Portfolio Administrator" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	10

4122-97-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 728654 Ontario Inc. c.o.b. as Hanrahan's Tavern (Respondent)

Unit: "all part-time employees of 728654 Ontario Inc. c.o.b. as Hanrahan's Tavern in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, persons in bargaining units for which any trade union held bargaining rights as of February 2, 1998 and security/doorstaff" (11 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

4160-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Relax Hotel Windsor 1998 Limited Partnership c.o.b. as Travelodge Windsor Ambassador Bridge (Respondent)

Unit: "all employees of Relax Hotel Windsor 1998 Limited Partnership c.o.b. as Travelodge Windsor Ambassador Bridge employed at 2330 Huron Church Road West in Windsor, Ontario save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons employed in the position of Night Auditor and co-op students" (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of ballots marked in favour of applicant	15
Number of ballots marked against applicant	7

4209-97-R: Teamsters Local Union No. 938 (Applicant) v. Novicanadian Ltd. (Respondent)

Unit: "all employees of Novicanadian Ltd. in Mississauga, Ontario, excluding supervisors, persons above the rank of supervisor, office and sales staff" (28 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	19
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	19
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	1

4217-97-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1050261 Ontario Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 1050261 Ontario Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of 1050261 Ontario Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non- working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	0

4218-97-R: Canadian Union of Public Employees (Applicant) v. Soonor Retirement Corporation (Respondent)

Unit: "all employees of Windsor Park Retirement Residence owned and operated by Soonor Retirement Corporation in Sault Ste. Marie, save and except the Administrative Assistant, Director of Care, Head of Housekeeping, Head of Dietary, Head of Banquet, Activity Co-ordinator, Administrator, and Comptroller" (39 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	10

4316-97-R: Local Union 47 Sheet Metal Workers' International Association (Applicant) v. J. P. Lessard Canada Inc. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of J. P. Lessard Canada Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of J. P. Lessard Canada Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	12

4371-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Loeb Inc. (Respondent)

Unit: "all employees of Loeb Inc. located at 39 Winner's Circle in the Town of Arnprior, save and except Store Director, one Assistant Director, six Department Managers, office employees and management trainees" (45 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	10

4400-97-R: Centrale des syndicats francophones de l'Ontario (Applicant) v. Le Conseil scolaire catholique de district des Grandes Rivières (région de Kirkland Lake-Timiskaming) (Respondent)

Unit: "les concierges et les préposés à l'entretien général employés par le Conseil scolaire catholique de district des Grandes Rivières pour les bureaux administratifs et les écoles élémentaires et secondaires de langue française (région de Kirkland Lake-Timiskaming)" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
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Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	5

4423-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Amity Goodwill Industries (Respondent)

Unit: "all employees of Amity Goodwill Industries Retail Division/Outlet in the City of Stoney Creek, save and except Assistant Manager/s, persons above the rank of Assistant Manager, Co-op students and etc. (extended training clients)" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	1

4430-97-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. Canadian Red Cross Society (Ontario Zone) (Respondent)

Unit: "all employees employed by the Canadian Red Cross Society (Ontario Zone) in the Homemaker Services Program in the City of Dryden and the Towns of Vermilion Bay, Eagle River, Minnitaki, Oxdrift, Eton-Rugby, Wabigoon, Dinorwic, Borup's Corners, Dyment, Ignace, Sioux Lookout, Hudson, Silver Dollar, O'Brien's Landing, Red Lake Road, Quibell, Camp Robinson, Perrault Falls, Wabuskang, Golf Pines, Ear Falls, Starratt-Olsen, Madsen, Red Lake, Balmertown, Cochenour and MacKenzie Island, save and except supervisors, and persons above the rank of supervisor" (32 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	8

4431-97-R: Ontario Nurses' Association (Applicant) v. Sidbrook Private Hospital (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all registered and graduate nurses employed by Sidbrook Hospital in the Town of Cobourg, save and except Director of Nursing and persons above the rank of Director of Nursing" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of applicant	7
Number of ballots segregated and not counted	1

4473-97-R: Canadian Union of Public Employees (Applicant) v. Northwest Catholic District School Board (Respondent) v. Office & Professional Employees International Union (Intervener)

Unit: "all office, clerical, technical and teaching assistants employed by the Northwest Catholic District School Board in Fort Francis and Stratton, save and except supervisors, persons above the rank of supervisor, Executive Secretary to the Director of Education, Executive Secretary to the Supervisor of Operations, and employees in the bargaining units for which any trade union held bargaining rights on February 24, 1998" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of ballots marked in favour of applicant	14

4492-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Town of Bradford West Gwillimbury (Respondent)

Unit: "all employees of the Corporation of the Town of Bradford West Gwillimbury in the Parks & Recreation Department in the Town of Bradford West Gwillimbury, save and except Superintendents, persons above the rank of Superintendent, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1

4494-97-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the County of Prince Edward (Respondent)

Unit: "all office, clerical and technical employees of the Corporation of the County of Prince Edward, save and except CAO/Clerk, Administrative Assistant to C.A.O., Director of Human Resources, Assistant to the Director of Human Resources, Assistant to the Head of Council, Treasurer, Deputy Treasurer/Tax Collector, Deputy Clerk, McFarland Home Administrator, Director of Resident Care, Administrative Assistant/Budget Officer, Plant Co-ordinator and Dietary Supervisor, Director of Public Works, Public Works Construction Manager, Public Works Maintenance Manager, Environmental Services Manager, Waste management Supervisor, Water/Sanitary Supervisor, Water Services Foreman, Director of Planning, Deputy Director of Planning, Chief Building Official, Fire Chief, Deputy Fire Chief/Prevention Officer, Physical, Properties Supervisor, Satellite Office Co-ordinator, Museum Curators and persons for whom any trade union held bargaining rights on the date of application" (15 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of applicant	12

4495-97-R: International Union of Operating Engineers, Local 793 (Applicant) v. Northeastern Ontario Regional Alliance for the Disabled (Respondent)

Unit: "all employees of Northeastern Ontario Regional Alliance for the Disabled in the Regional Municipality of Sudbury, save and except NEORAD's Board of Directors" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0

4502-97-R: Canadian Union of Public Employees (Applicant) v. St. Christopher House (Respondent)

Unit: “all employees of St. Christopher House in the City of Toronto, save and except the Unit Director, persons above the rank of Unit Director, Information Systems Coordinator, Secretary Planning and Administration, Finance Coordinator, and Manager Administration and Human Resources, and persons for whom a trade union held bargaining rights on the date of application” (68 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	84
Number of persons who cast ballots	27
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	26
Number of segregated ballots cast by persons whose names appear on voter’s list	1
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	1

4603-97-R: Canadian Union of Public Employees (Applicant) v. Keelmount Daycare of Toronto Incorporated (Respondent)

Unit: “all employees of Keelmount Daycare of Toronto Incorporated, save and except Supervisor and persons above the rank of Supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	5
Number of ballots marked in favour of applicant	5

4648-97-R: Teamsters Local Union No. 879 (Applicant) v. Taylor Chrysler Dodge (Respondent)

Unit: “all automotive service technicians of Taylor Chrysler Dodge in the City of Hamilton, save and except Supervisors, persons above the rank of Supervisor, office and sales staff” (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	10
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	10
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	4

Applications for Certification Dismissed Without Vote

4221-97-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. T & R Sargent Farms Ltd. (Respondent)

4410-97-R: Ontario Secondary School Teachers’ Federation (Applicant) v. Niagara Catholic District School Board (Respondent) v. Canadian Union of Public Employees (Intervener)

Applications for Certification Dismissed Subsequent to Vote

2758-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dominion Sheet Metal & Roofing Works (Respondent) v. Labourers’ International Union of North America (Intervener)

Unit: “all roofers, metalmen and their helpers, including dependent pieceworkers and hourly paid employees engaged in all phases of roofing, including the application of shingles, louvers, roof vents, eave protection, step flashing, metal or asphalt valleys, ice and water shield and corner pans in all sectors of the construction industry,

excluding the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, persons engaged in re-roofing, hourly servicemen, flat roofers, aluminum/vinyl applicators, office, warehouse/shop and clerical employees” (77 employees in unit)

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	77
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	31
Number of ballots marked in favour of intervener	42
Number of ballots segregated and not counted	2

3659-95-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Chislett Asphalt Roofing Corporation (Respondent) v. Labourers' International Union of North America (Intervener)

Unit: “all roofers, metalmen and their helpers, including dependent pieceworkers and hourly paid employees engaged in all phases of roofing, including the application of shingles, louvers, roof vents, eave protection, step flashing, metal or asphalt valleys, ice and water shield and corner pans in all sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Province of Ontario, save and except non-working foremen, persons above the rank of non-working foreman, persons engaged in re-roofing, hourly servicemen, flat roofers, aluminum/vinyl applicators, office, warehouse/shop and clerical employees” (45 employees in unit)

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	45
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of intervener	33
Number of ballots segregated and not counted	1

0569-97-R: Labourers' International Union of North America, Local 183 (Applicant) v. Atlantis Restoration Service Ltd. (Respondent)

Unit: “all construction labourers in the employ of Atlantis Restoration Service Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of Atlantis Restoration Service Ltd. in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (16 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	16
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	7

3214-97-R: Centrale Des Syndicats Francophones De L'Ontario (Applicant) v. The Sudbury and District Roman Catholic School Board (Respondent)

Unit: “all secretarial and clerical employees of the Sudbury District Roman Catholic Separate School Board, save and except supervisors and persons above the rank of supervisors” (25 employees in unit)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	35

Number of spoiled ballots	0
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	38

3354-97-R: Centrale des syndicats francophones de l'Ontario (Applicant) v. Le Conseil des écoles séparées catholiques du district de Sudbury (Respondent)

Unit: "les assistantes et assistants aux élèves à l'emploi du Conseil des écoles séparées catholiques du district de Sudbury, dans ses écoles élémentaires et secondaires" (12 employees in unit)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	20
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	21

4191-97-R: Teamsters Local Union No. 419 (Applicant) v. Med-Tech Environmental Ltd. (Respondent)

Unit #1: "all employees of the Responding Party in the Regional Municipality of Peel excluding foreman, persons above the rank of foreman, office and sales staff." (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	14
Number of names of persons on revised voters' list	20
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	14

Unit #2: "all employees of Med-Tech Environmental Limited in the City of Brampton save and except foremen, persons above the rank of foreman, office and sales staff" (20 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	14
Number of names of persons on revised voters' list	20
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	14

4211-97-R: U.F.C.W. Local 333 (Applicant) v. Riviera Security Services Inc. (Respondent)

Unit: "all employees of Riviera Security Services Inc. in the Province of Ontario, save and except supervisors and persons above the rank of supervisor and office and sales staff." (38 employees in unit)

Number of names of persons on revised voters' list	38
Number of persons who cast ballots	20

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	12
Number of ballots segregated and not counted	1

4323-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. AMK Metal Products, a division of Rea International Inc. (Respondent)

Unit: "all employees of AMK Metal Products in the Municipality of Bowmanville save and except supervisors, those above the rank of supervisor and clerical staff" (126 employees in unit)

Number of names of persons on revised voters' list	126
Number of persons who cast ballots	125
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	125
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	60
Number of ballots marked against applicant	64

4344-97-R: Canadian Union of Public Employees (Applicant) v. Incorporated Synod of the Diocese of Ottawa (Respondent)

Unit: "all employees of the Incorporated Synod of the Diocese of Ottawa - Anglican Diocese, Women in Crisis Project, save and except Co-ordinator and any person for whom a trade union held bargaining rights of the date of Application" (17 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	5

4354-97-R: Service Employees International Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Ricmar Limited Partnership (Respondent)

Unit: "all employees of The Ricmar Limited Partnership at its Pat and Mario's Restaurant in the City of Toronto, save and except persons above the rank of Supervisor and Managers" (57 employees in unit)

Number of names of persons on revised voters' list	68
Number of persons who cast ballots	67
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	67
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	35

4363-97-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Central Health Services (Respondent)

Unit: "all employees of Central Health Services in London and Middlesex County, save and except supervisors and persons above the rank of supervisor" (40 employees in unit)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	6

Number of spoiled ballots	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

4451-97-R: Teamsters Local Union 938 (Applicant) v. CF Edible Oils Inc. c.o.b. CanAmara Foods (Respondent)

Unit: "all employees of CF Edible Oils Inc. working in the City of Oakville save and except supervisors and persons above the rank of supervisors, office, clerical and sales staff" (55 employees in unit)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	55
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	55
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	43

4530-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. ITL Industrial Tires, Division of Cascade (Canada) Inc. (Respondent)

Unit: "all employees of Industrial Tires Limited in the City of Mississauga except supervisors, those above the rank of supervisor, office and clerical staff, and engineering and sales staff" (129 employees in unit)

Number of names of persons on revised voters' list	131
Number of persons who cast ballots	126
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	119
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	38
Number of ballots marked against applicant	83
Number of ballots segregated and not counted	3

4534-97-R: United Steelworkers of America (Applicant) v. Crawford Metal Corporation/Corporation Acier Crawford (Respondent)

Unit: "all employees of Crawford Metal Corporation/Corporation Acier Crawford in the City of Burlington, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff" (32 employees in unit)

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	2

4647-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Cold Springs Farm Limited (Respondent) v. Cold Springs Farm Employees' Association, (Intervener)

Unit: "all employees of Cold Springs Farms Limited in the Village of Thamesford, in the Township of Zorra, working in the fabrication, electrical, maintenance/millwrights, garage, waste treatment and general construction departments, the turkey processing plant and the protein recovery plant, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff, and persons for whom the Canadian Union of Operating Engineers and General Workers held bargaining rights as of March 5, 1998" (295 employees in unit)

Number of names of persons on revised voters' list	307
Number of persons who cast ballots	293
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	292
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	121
Number of ballots marked in favour of intervener	168

Applications for Certification Withdrawn

0724-97-R: International Brotherhood of Electrical Workers, Construction Council of Ontario (Applicant) v. Carlo's Electric Limited (Respondent) v. Carlo's Electric Employees Association (Intervener)

1474-97-R: Labourers' International Union of North America (Applicant) v. Baghai & Cho Incorporated (Respondent)

3249-97-R: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Construction Valeur + Inc. Entrepreneur General (Respondent)

4151-97-R: Service Employees' Union, Local 210 (Applicant) v. Avon Maitland District School Board (Respondent)

4420-97-R: Centrale des syndicats francophones de l'Ontario (Applicant) v. Le Conseil scolaire de district catholique français Nipissing-Parry Sound (Respondent) v. Office and Professional Employees International Union (Intervener)

4504-97-R: Communications, Energy & Paperworkers Union of Canada, Local 63-0 (Applicant) v. Avesta Abe Ltd. (Respondent)

4556-97-R: United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. J.A. MacDonald (London) Ltd. (Respondent)

4945-97-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Olympic Honda (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2302-96-R: Communications, Energy and Paperworkers Union of Canada and its Local 333-30 (Applicant) v. Atlantic Packaging Products Ltd. (Respondent) (*Withdrawn*)

2272-97-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. 471177 Ontario Limited c.o.b. as S&E Mechanical and 1226220 Ontario Inc. c.o.b. as K&C Mechanical (Respondents) (*Withdrawn*)

2322-97-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 634 (Applicant) v. 1085803 Ontario Ltd. c.o.b. as The Grand Theatre and 1168075 Ontario Limited c.o.b. as "Big Thunder Night Club" (Respondents) (*Granted*)

2349-97-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Raspa Mechanical Inc. and Raspa Plumbing and Heating Limited and 1098734 Ontario Inc. c.o.b. as Christal Mechanical (Respondents) (*Granted*)

4215-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Tony Froio Carpentry, 1050261 Ontario Inc. (Respondents) (*Withdrawn*)

4355-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Keele Electric Limited and Campoli Electric Ltd. (Respondents) (*Granted*)

SALE OF A BUSINESS

2302-96-R: Communications, Energy and Paperworkers Union of Canada and its Local 333-30 (Applicant) v. Atlantic Packaging Products Ltd. (Respondent) (*Withdrawn*)

0232-97-R: The United Steelworkers of America and Local 5295 (Applicant) v. Intercon Security Inc. (Respondent) v. 20 Vic Management Inc. (Intervener) (*Withdrawn*)

2272-97-R: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. 471177 Ontario Limited c.o.b. as S&E Mechanical and 1226220 Ontario Inc. c.o.b. as K&C Mechanical (Respondents) (*Withdrawn*)

2322-97-R: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 634 (Applicant) v. 1085803 Ontario Ltd. c.o.b. as The Grand Theatre and 1168075 Ontario Limited c.o.b. as “Big Thunder Night Club” (Respondents) (*Endorsed Settlement*)

2349-97-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Raspa Mechanical Inc. and Raspa Plumbing and Heating Limited and 1098734 Ontario Inc. c.o.b. as Christal Mechanical (Respondents) (*Granted*)

4215-97-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1050261 Ontario Inc. (Respondent) (*Withdrawn*)

4355-97-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Keele Electric Limited and Campoli Electric Ltd. (Respondents) (*Dismissed*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2846-96-R: Kap Soo Kyun (Applicant) v. Retail, Wholesale Canada, Canadian Service Sector Division of United Steelworkers of America, Local 440 (Respondent) v. Eaz-Lift Spring Corp. (Ontario) Ltd. (Intervener)

Unit: “all employees of Eaz-Lift Spring Corp. (Ontario) Ltd. in the unit described in the certification order of the Ontario Labour Relations Board, save and except supervisor and persons above the rank of supervisors, office and sales staff. The bargaining unit described in the Board’s certificate is all employees of the Eaz-Lift Spring Corp. (Ontario) Ltd. in the City of London, save and except General Manager, and persons above the rank of General Manager” (1 employee in unit) (*Granted*)

Number of names of persons on revised voters’ list	1
Number of persons who cast ballots	6
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1
Number of ballots segregated and not counted	5

0052-97-R: Peter Menzies (Applicant) v. Canadian Union of Public Employees (Respondent) v. Native Child and Family Services of Toronto (Intervener)

Unit: “all employees of Native Child and Family Services of Toronto, save and except Program Coordinators and Supervisors and persons above the rank of Program Coordinator and Supervisor” (25 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	25
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	15

Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	11

3477-97-R: Cora Gardner (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Respondent) v. Ken Bodnar Enterprises Inc. (Intervener)

Unit: "all employees of Ken Bodnar Enterprises Inc. in the Town of Collingwood, save and except Store Manager, Service Manager, Automotive Manager, persons above the rank of Store Manager, Service Manager, Automotive Manager and Office Manager, and Head Cashier" (31 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	40
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	31

3534-97-R: Rick Wazid (Applicant) v. United Steelworkers of America (Respondent) v. Saxum Canada Inc. (Intervener) (*Withdrawn*)

3802-97-R: Cora Gardner (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1000 (Respondent)

Unit: "all employees of Ken Bodnar Enterprises Inc. in the Town of Collingwood, save and except Store Manager, Service Manager, Automotive Manager, persons above the rank of Store Manager, Service Manager, Automotive Manager and Office Manager, and Head Cashier" (31 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	40
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	31

4140-97-R: Harbourfront Centre (Applicant) v. International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Local 58, Toronto (Respondent) (*Withdrawn*)

4173-97-R: Jason McConnachie and Arnold Hernandez (Applicant) v. Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Respondent) v. Ideal Railings Ltd. (Intervener)

Unit: "all employees of Ideal Railings Limited working at and out of Metropolitan Toronto, save and except foreman, persons above the rank of foreman, office, sales and clerical employees" (22 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	22
Number of ballots marked in favour of respondent	4
Number of ballots marked against respondent	18

4181-97-R: Vincent Casey (Applicant) v. International Union of Bricklayers and Allied Craftsmen Local 29 (Respondent)

Unit: "all employees of Hoogovens Refractory Services Inc. in the City of Sault Ste. Marie, save and except supervisors, those above the rank of supervisors, office, clerical and technical staff and sales staff" (15 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	11

4193-97-R: Lisa Kearns and Kim McAllister-Hartsell (Applicants) v. United Steel Workers of America (Respondent) v. Seeburn Division, Ventra Group Inc. (Intervener)

Unit: "all employees of Ventra Group Inc. in its Seeburn Division in the Town of New Tecumseh, save and except supervisors, persons above the rank of supervisor, and engineering, office, clerical, sales, security staff and students employed on a co-op work/study program" (192 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	192
Number of persons who cast ballots	184
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	184
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	121
Number of ballots marked against respondent	62

4305-97-R: Bonnie Hascher (Applicant) v. Service Employees Union Local 268 (Respondent) v. The Brick Warehouse Corporation (Intervener)

Unit: "all employees of The Brick Warehouse Corporation in the City of Thunder Bay, save and except supervisors and persons above the rank of supervisor" (26 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of ballots marked in favour of respondent	14
Number of ballots marked against respondent	9
Number of ballots segregated and not counted	1

4365-97-R: David John Gelinas (Applicant) v. Labourers' International Union of North America, Local 1059 (Respondent) v. Stinson Security Services Ltd. (Intervener)

Unit: "all security guards of Stinson Security Services Limited at Cuddy Food Products, 1226 Trafalgar Street, in the City of London, save and except supervisors, persons above the rank of supervisors" (5 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	3

4446-97-R: Gerald A. Higgins (Applicant) v. Labourers' International Union of North America Local 1089 (Respondent) v. Sanitary Maintenance Co. Ltd. (Intervener)

Unit: "all employees of Sanitary Maintenance Co. Ltd. in the City of Sarnia, Ontario, the Municipality of Point Edward and the Municipality of Corunna, Ontario" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	7

4501-97-R: A Group of Employees of Harvey Krotz Limited (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 4176 (Respondent) v. Harvey Krotz Limited (Intervener)

Unit: "all employees of Harvey Krotz Limited at Listowel employed in any of the following job classifications save and except foremen, person above the rank of foremen, office staff, salesmen: mechanic, apprentice mechanic, parts entry, parts intermediate, parts senior, lube, oil and filter employee, car cleanup, car washer, parts driver, lot man" (12 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of respondent	8
Number of ballots marked against respondent	3

4513-97-R: Corporation of the City of Thunder Bay (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) (*Dismissed*)

4517-97-R: Sherry Brandle (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Cerminara Boys' Residence Inc. (Intervener)

Unit: "all employees of Cerminara Boys' Residence Inc. in the Regional Municipality of Niagara save and except supervisors and persons above the rank of supervisor" (17 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	14

4523-97-R: Staff of North Frontenac Community Services (Applicant) v. Ontario Public Services Employees Union, Local 427 (Respondent) (*Dismissed*)

4544-97-R: Mark Malone (Applicant) v. United Food and Commercial Workers International Union, Local 175 & 633 (Respondent) v. Rick's Gas Tank Factory Ltd. c.o.b. as Rick's Gas Tank Factory Ltd. and Radiator Warehouse (Intervener) (*Dismissed*)

4646-97-R: Employees of Russo Foods 90 Limited (Applicant) v. United Food & Commercial Workers Union (Respondent) v. Russo Foods 90 Limited (Intervener) (*Dismissed*)

4746-97-R: Employees of 964341 Ontario Inc. o/a T&P Shell, represented by Troy Brazeau (Applicant) v. United Steel Workers of America, Local 414 (Respondent) (*Granted*)

4759-97-R: S. Anglin Company Limited (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada and its Local 522 (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

4841-97-U: Greening Donald Co. Ltd. (Applicant) v. United Steelworkers of America, Local 6266 (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0303-96-U: Jeff Morabito (Applicant) v. CAW Local 275 (Respondent) v. John Deere Welland Works of John Deere Limited (Intervener) (*Dismissed*)

2303-96-U: Communications, Energy and Paperworkers Union of Canada and its Local 333-30 (Applicant) v. Whitby Cogeneration Limited Partnership (Respondent) (*Withdrawn*)

3162-96-U: Richard O'Quinn (Applicant) v. Ray Bartolotti and Teamsters Local Union 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) (*Withdrawn*)

0644-97-U: Manuel Fernandez (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Maplecrete Construction Ltd. (Intervener) (*Withdrawn*)

0806-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 1996 (Applicant) v. The Quaker Oats Company of Canada Limited (Respondent) (*Withdrawn*)

0970-97-U: The Canadian Union of Public Employees and its Local 1521 (Applicant) v. Ottawa-Carleton Association for Persons with Developmental Disabilities (Respondent) (*Withdrawn*)

1102-97-U: Viktor Tsimakouridze (Applicant) v. United Plant Guard Workers of America (Respondent) v. Burns International Security Services Limited (Intervener) (*Withdrawn*)

1274-97-U: Joseph Victor Pratt and Barbara Pratt ("Legal Power of Attorney") (Applicant) v. Labourers International Union of North America, (Respondent) v. Greenwin Property Management Inc. (Intervener) (*Dismissed*)

1379-97-U: United Steelworkers of America (Applicant) v. Ken Bodnar Enterprises Inc. (Respondent) (*Withdrawn*)

1437-97-U: Mohamed Elkhatab (Applicant) v. International Brotherhood of Boilermakers, Local 128 (Respondent) v. O'Connor Tanks Limited (Intervener) (*Dismissed*)

1931-97-U: Rosa Nunez (Applicant) v. Grand National Apparel Inc. and Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (Respondents) (*Dismissed*)

2265-97-U: Service Employees International Union, Local 210 (Applicant) v. 928598 Ontario Ltd. (Respondent) (*Withdrawn*)

2305-97-U: Charles Tovey, and all persons signatory to Petition for Seniority (Applicant) v. C.A.W. Local 222 (Respondent) (*Granted*)

2407-97-U: Sergio Greci (Applicant) v. United Food and Commercial Workers International Union, Local 1990 (Respondent) v. Primo Foods, a Division of Nabisco Ltd. (Intervener) (*Endorsed Settlement*)

2426-97-U: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Jacques Laperle c.o.b. Jacques Laperle Enterprises, Jacques Laperle and Pat Laperle (Respondent) (*Withdrawn*)

2736-97-U: Shirley Martens (Applicant) v. Windsor Regional Hospital (Respondent) v. Ontario Nurses' Association (Intervener) (*Withdrawn*)

2802-97-U: Service Employees' International Union, Local 204 (Applicant) v. Paragon Health Care (Ontario) Inc. o/a Casa Verde Retirement Unit (Respondent) (*Withdrawn*)

2831-97-U: The International Association of Machinists and Aerospace Workers, Local 905 (Applicant) v. Messier-Dowty Inc. (Respondent) (*Endorsed Settlement*)

2841-97-U: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 1144021 Ontario Ltd. c.o.b. as Inn On The Park (Respondent) (*Withdrawn*)

3104-97-U: Valda Donaldson (Applicant) v. United Food and Commercial Workers International Union Local 529P (Respondent) v. Cadbury Chocolate Canada Inc. & (Intervener) (*Dismissed*)

3255-97-U: Norma M. Balatbat (Applicant) v. United Food and Commercial Workers International Union Local 351 (Respondent) v. Cambridge Suites Hotel (Intervener) (*Withdrawn*)

3346-97-U: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Cy Rheault Construction Ltd. (Respondent) (*Withdrawn*)

3393-97-U: United Steelworkers of America (Applicant) v. Equine Forgings Limited (Respondent) (*Withdrawn*)

3410-97-U: The Amalgamated Transit Union, Local 1587 (Applicant) v. Bombardier Inc. (Respondent) (*Withdrawn*)

3426-97-U: Ontario Public Service Employees Union (Applicant) v. Kingston Friendship Homes (Respondent) (*Endorsed Settlement*)

3451-97-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Thomson Canada Limited (Respondent) (*Withdrawn*)

3585-97-U: United Steelworkers of America (Applicant) v. Society of St. Vincent de Paul, Toronto Central Council (Respondent) (*Withdrawn*)

3598-97-U: London & District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Euro United Corporation (Respondent) (*Terminated*)

3684-97-U: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. 509806 Ontario Limited o/a Fuller Utility Services (Respondent) (*Withdrawn*)

3692-97-U: Ed Veluz (Applicant) v. United Steelworkers of America, Local 236 (Respondent) v. Windsor Ceramics (Intervener) (*Withdrawn*)

3723-97-U: Eaton Dennis (Applicant) v. C.A.W. Local 124 (Respondent) (*Withdrawn*)

3803-97-U; 3804-97-U: Roland R. Price (Applicant) v. Canadian Waste Services Inc. (Respondent) (*Withdrawn*)

3842-97-U: Employees of Chrysler Bramalea Assembly Plant & Members of CAW Local 1285 Department 210-Polish Deck-East Repair Line-B-Shift (Applicant) v. Canadian Autoworkers Union Local 1285 (Respondent) v. Chrysler Canada Ltd. (Intervener) (*Withdrawn*)

3958-97-U: Robert McDonald (Applicant) v. Ontario English Catholic Teachers' Association (Respondent) (*Withdrawn*)

4174-97-U: Catherine and Denny McNorton (Applicant) v. United Food and Commercial Workers Union, Local 1000A (Respondent) v. National Grocers Co. Ltd. and Loblaws Supermarkets Ltd. (Intervener) (*Dismissed*)

4220-97-U: Ivan Cusnir (Applicant) v. Bakery, Confectionery & Tobacco Workers International Union Local 264 (Respondent) (*Withdrawn*)

4222-97-U: United Food and Commercial Workers International Union, Local 175 (Applicant) v. T & R Sargent Farms Ltd. and Stephen Wagner (Respondent) (*Dismissed*)

4425-97-U: Edward Baranowski (Applicant) v. Local 506 International Labour Union of North America (Respondent) (*Dismissed*)

4445-97-U: Ahmed Mohamed Jama (Applicant) v. The Canada Council of Teamsters, Local 938 (Respondent) (*Withdrawn*)

4464-97-U: International Association of Machinists and Aerospace Workers (Applicant) v. Mancuso Chemicals Limited (Respondent) (*Withdrawn*)

4497-97-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Matcor Automotive Inc. (Respondent) (*Withdrawn*)

4508-97-U: Albert Antoine Plennevaux (Applicant) v. William Suppa, Arthur Coia, W. Douglas Gow, Robert Luskin, Peter Vaira (Respondents) (*Dismissed*)

4514-97-U: Wayne MacDonald & Jamie Brunsten (Applicant) v. Service Employees International Union Local 220 (Respondent) (*Dismissed*)

4608-97-U: Geraldine D. Feeney (Applicant) v. Canadian Union of Public Employees, Local 218 (Respondent) (*Withdrawn*)

4610-97-U: Association of Allied Health Professionals: Ontario (Applicant) v. Kingston Frontenac and Lennox and Addington Community Care Access Centre (Respondent) (*Withdrawn*)

4734-97-U: Harvinder Ahluwalia (Applicant) v. CAW Local 124 (Respondent) (*Dismissed*)

4801-97-U: United Steelworkers of America (Applicant) v. Canada Woodtape Inc. (Respondent) (*Withdrawn*)

4970-97-U: Wendy Dakin (Applicant) v. Weetabix of Canada (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

4740-97-M: United Food and Commercial Workers, Local 1227 (Applicant) v. Maple Leaf Pork, a Division of Maple Leaf Meats Inc. (Respondent) (*Dismissed*)

4800-97-M: United Steelworkers of America (Applicant) v. Canada Woodtape Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

0507-96-M: Miriam Grace Bussieres (Applicant) v. Ontario Public Service Employees Union and Province of Ontario Ministry of the Solicitor General and Correctional Services (Respondents) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

4463-97-M: United Food and Commercial Workers Union, Local 351 (Applicant) v. Anchor Textiles A Division of Work Wear Corporation of Canada (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

4242-96-JD: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Ryco-Alberici and International Union of Operating Engineers, Local 793 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2874-94-M: Ottawa & District Association for the Mentally Retarded (Applicant) v. Canadian Union of Public Employees, Local 1521 (Respondent) (*Dismissed*)

1320-97-M: Brant Community Care Access Centre (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

4731-97-M: Communications, Energy & Paperworkers Union of Canada, Local 72M (Applicant) v. TV Ontario (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2125-97-OH: Roza Radin (Applicant) v. Bakery, Confectionary and Tobacco Workers' International Union - Local 181 (Respondent) (*Dismissed*)

3348-97-OH: Anthony A. Buttaro (Applicant) v. Dofasco Inc. (Respondent) (*Withdrawn*)

3605-97-OH: Stephen Oughtred (Applicant) v. Commercial Alcohols Inc. (Respondent) (*Withdrawn*)

3791-97-OH: Gobin Lutchmedial (Applicant) v. Gibson Textile Dyers Ltd. (Respondent) (*Withdrawn*)

3845-97-OH: Emmanuel Seukunian (Applicant) v. ARZ Bakery Ltd. (Respondent) (*Withdrawn*)

3893-97-OH: Alvin Lutchmedial (Applicant) v. Gibson Textiles Dyers Ltd. (Respondent) (*Withdrawn*)

4095-97-OH: Darlene J. Carter (Applicant) v. Eatons (Respondent) (*Withdrawn*)

4362-97-OH: Joyce Guenette (Applicant) v. Hanmer Bus Lines Inc. (Respondent) (*Withdrawn*)

4411-97-OH: Douglas James Wagar (Applicant) v. John Reid & Son Tony Iasso (Respondent) (*Withdrawn*)

4576-97-OH: Clark Andrew Wallace (Applicant) v. Famous Players Inc. (Respondent) (*Withdrawn*)

4669-97-OH: Antonio Carvalho (Applicant) v. G. Tari Limited (Respondent) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

4130-97-U: OPSEU Local 653 (Applicant) v. Northern College of Applied Arts and Technology (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

4088-95-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Eton Construction Ltd. (Respondent) (*Withdrawn*)

0180-96-G: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Applicant) v. Wm. Roberts Electrical and Mechanical Limited and Wm. Roberts Investments Inc. and Conestogo Mechanical Inc. and Conestogo Electrical Inc. and Wm. Roberts Electrical and Mechanical Inc. and Maple Key Investments Inc. and Hebel Sheet Metal Inc. (Respondents) (*Dismissed*)

0892-96-G: International Union of Bricklayers and Allied Craftworkers, Local 2 - Toronto, Barrie, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftworkers (Applicant) v. Eton Construction Ltd. (Respondent) (*Withdrawn*)

3282-96-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Patrick's Spray-All Products Ltd. (Respondent) (*Granted*)

0276-97-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Adam Clark Company Ltd. (Respondent) (*Withdrawn*)

1592-97-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Enerdry Constructors Ltd. (Respondent) (*Granted*)

1842-97-G; 1843-97-G: Kennedy Masonry Company Limited ("Kennedy") and , Don Valley Masonry Ltd. ("Don Valley") (Applicants) v. Bricklayers, Masons Independent Union of Canada, Local 1, Labourers' International Union of North America, Local 183 and the, Masonry Council of Unions of Toronto and Vicinity ("the union") (Respondents) (*Withdrawn*)

2211-97-G: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. The Board of Education for the City of Windsor (Respondent) (*Withdrawn*)

2266-97-G: Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. 471177 Ontario Limited c.o.b. as S&E Mechanical and 1226220 Ontario Inc. c.o.b. as K&C Mechanical (Respondents) (*Withdrawn*)

2348-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Raspa Mechanical Inc. and Raspa Plumbing and Heating Limited and 1098734 Ontario Inc. c.o.b. as Christal Mechanical (Respondents) (*Granted*)

2830-97-G: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. George Stone & Sons Ltd. (Respondent) (*Withdrawn*)

2840-97-G: International Union of Bricklayers and Allied Craftworkers Local #20 Ontario (Applicant) v. Limen Masonry Limited (Respondent) (*Granted*)

2908-97-G; 3238-97-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Corp. (Respondent) (*Dismissed*)

3225-97-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. JSK Insulation Limited (Respondent) (*Endorsed Settlement*)

3668-97-G: Labourers' International Union of North America, Local 506 (Applicant) v. Tri-Con Concrete Finishing Co. Ltd. (Respondent) (*Withdrawn*)

3686-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Osler Paving Ltd. (Respondent) (*Granted*)

3811-97-G: International Brotherhood of Painters & Allied Trades (Applicant) v. Portes et Fenetres Guylain Inc. (Respondent) (*Granted*)

3830-97-G: International Brotherhood of Painters and Allied Trades, Local Union 205 (Applicant) v. Star Painters & Decorators Incorporated (Respondent) (*Granted*)

4179-97-G: Labourers' International Union of North America, Local 506 (Applicant) v. Triple "R" Demolition Inc. (Respondent) (*Granted*)

4180-97-G: Teamsters Local Union No. 230 Affiliated with the International Brotherhood of Teamsters (Applicant) v. Metric Contracting Services Corporation (Respondent) (*Endorsed Settlement*)

4192-97-G: United Brotherhood of Carpenters and Joiners of America, Locals 18 and 1946 (Applicant) v. Accurate Millwork Installations (Respondent) (*Withdrawn*)

4318-97-G: Marble, Tile & Terrazzo Union, Local 31 affiliated with International Union of Bricklayers and Allied Craftsmen (Applicant) v. Castlewall Development Ltd. (Respondent) (*Granted*)

4324-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. An-Dell Electric Ltd. (Respondent) (*Withdrawn*)

4330-97-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Power Station Construction (A Division of 1096748 Ontario Ltd.) (Respondent) (*Withdrawn*)

4356-97-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Keele Electric Limited and Campoli Electric Ltd. (Respondents) (*Dismissed*)

4375-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Columbus Aluminum & Roofing Ltd. (Respondent) (*Granted*)

4388-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Losereith Sales and Service Ltd. (Respondent) (*Withdrawn*)

4389-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Martek Drywall and Acoustics (Respondent) (*Withdrawn*)

4390-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Star West Plaster and Cement Finishing Inc. (Respondent) (*Withdrawn*)

4406-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lopes Drywall and Acoustics Inc. (Respondent) (*Withdrawn*)

4408-97-G: Labourers' International Union of North America, Local 183 (Applicant) v. Gamen Paving Inc. (Respondent) (*Granted*)

4412-97-G: Teamsters Local Union No. 230, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Dancor Enterprises (695715 Ontario Inc.) (Respondent) (*Granted*)

4413-97-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Cahill Electric Limited (Respondent) (*Granted*)

4426-97-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada on its own behalf and on behalf of its Local Union 527 (Applicant) v. BFC Construction Corporation, BFC Industrial, (Nicholls-Radtke Ltd.) (Respondents) (*Withdrawn*)

4441-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. New Generation Drywall Inc., Marin Contracting Ltd. (Respondents) (*Withdrawn*)

4443-97-G: International Brotherhood of Painters and Allied Trades, District Council 46 (Applicant) v. Golden Brush Bros. Limited (Respondent) (*Withdrawn*)

4474-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Monac Steel Limited (Respondent) (*Withdrawn*)

4475-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Vision Almet Limited (Respondent) (*Withdrawn*)

4479-97-G; 4383-97-G: Labourers' International Union of North America, Local 597 (Applicant) v. J.J. McGuire General Contracting (Respondent) (*Granted*)

4509-97-G: The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1671 (Applicant) v. Lakeland Industrial Cleaning Services Ltd. (Respondent) (*Endorsed Settlement*)

4518-97-G: Drywall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Four Star Drywall Ltd. (Respondent) (*Withdrawn*)

4535-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. P. Steel Erectors Limited (Respondent) (*Granted*)

4537-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Today Tile & Carpet Ltd. (Respondent) (*Endorsed Settlement*)

4545-97-G: International Brotherhood of Painters & Allied Trades, Local 200 (Applicant) v. Crautek Glass (Respondent) (*Endorsed Settlement*)

4563-97-G: International Association of Bridge, Structural Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Var-Cor Steel Erection Limited (Respondent) (*Withdrawn*)

4582-97-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. Orangeville Steel Ltd. (Respondent) (*Withdrawn*)

4587-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cormar (1996) Contracting Limited (Respondent) (*Endorsed Settlement*)

4630-97-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Westpine Carpet & Tile Ltd. (Respondent) (*Withdrawn*)

4668-97-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wall II Wall Stucco Systems Inc. c.o.b. Wall 2 Wall Systems (Respondent) (*Granted*)

4756-97-G: International Union of Operating Engineers, Local 793 (Applicant) v. Active Excavating & Contracting (1985) Ltd. (Respondent) (*Endorsed Settlement*)

4811-97-G: International Brotherhood of Painter and Allied Trades, District Council 46 (Applicant) v. Bruno Painting & Decorating (Respondent) (*Withdrawn*)

4822-97-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. T. Lloyd Electric Hamilton Ltd. (Respondent) (*Endorsed Settlement*)

REFERRAL FROM MINISTER (SEC. 3(2)) HLDA

3550-97-U: Paragon Health Centre (Ontario) Inc. o/a Casa Verde Retirement Home (Applicant) v. Service Employees' International Union Local 204 (Respondent) (*Granted*)

3795-97-U: Sterling Place Ltd. Partnership c.o.b. as Sterling Place Retirement Lodge (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

3397-96-U: James Yeats (Applicant) v. Amalgamated Transit Union, Local 113 and (Respondent) v. Toronto Transit Commission (Intervener) (*Denied*)

2704-97-U: Marija Valerija Zuvic (Applicant) v. Service Employees International Union, Local 204 (Respondent) v. Peel Memorial Hospital (Intervener) (*Denied*)

3404-97-G: International Union of Operating Engineers, 793 (Applicant) v. Williams Contracting Limited (Respondent) (*Denied*)

3457-97-U: Giuseppe Cara (Applicant) v. Metropolitan Toronto Elementary Unit of the Ontario English Catholic Teachers Association (Respondent) (*Dismissed*)

3606-97-U: Fern Ferreira, Greg Dixon and Barry Allen (Applicants) v. Peter Norris and Ian MacDonald Local 113 A.T.U. (Respondents) (*Dismissed*)

3909—97-U: Chandra Ramdharry (Applicant) v. Chelsey Park Retirement Community, and London & District Service Workers' Union, Local 220 (Respondents) (*Denied*)

4353-97-U: Richard Allan Lequere (Applicant) v. The Bruce-Grey Catholic District School Board (Respondent) (*Dismissed*)



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